The Central Law Journal.

ST. LOUIS, DECEMBER 5, 1890.

THE *Albany Law Journal* is still of the same mind on the subject of Haskell v. Haskell, and continues to insist that the Supreme Court of Massachusetts failed to do its duty in not considering the case upon the facts. The journal in question seems to think, notwithstanding our words to the contrary, that we have taken upon ourselves to establish the proposition that it could possibly be more for the interest of the child to be intrusted to an adulterous mother than to its innocent father. We are free to agree with the learned editor upon that proposition. But inasmuch as the record of the case, as reported, does not disclose all the facts as stated by the *Albany Law Journal* upon which its attack was predicated, and as there is nothing to show that the Supreme Court of Massachusetts did not, in its judgment, consider the facts therein, we can see no justification for so violent an onslaught upon its decision wherein the proposition is correctly stated that "there is no absolute rule of law that the father is entitled to the custody of the children when he obtains a divorce from the bonds of matrimony on the ground of bigamy and adultery committed by the wife."

WE note in the *Ohio Law Bulletin* that the judge of the United States Circuit Court for Michigan has dissolved the injunction restraining the city of Grand Rapids from interfering with the Western Union telegraph poles on a certain street of that city. He holds that the congressional enactment giving the Western Union the use of government postal routes, is permissive only, and in using public streets and highways in the States, the company is amenable to the police powers vested in the States; that the charter of the city gives the city authorities power to regulate the use of streets, and to remove obstructions and encroachments, and that under the charter given by the State, the city authorities can exclude the poles and wires from any street, and can designate in which streets the wires shall be strung. The *Bulletin* observes that the question whether the city can exclude the wires entirely is not involved in the case, but to our mind the court simply halted upon the outskirts of that question, if it did not decide it.

THE Supreme Court of the United States, in the recent decision of Crowley v. Christensen, has rendered an opinion which may be considered as a weighty argument for the cause of temperance. It involved the important question of the right of a citizen to engage in the liquor business, and the extent and nature of the regulation which the government may impose in relation thereto. It appears, in that case, that the defendant, who had for some years conducted a retail liquor store in San Francisco, applied for a renewal of his license, but his application was denied by the police commisioners of the city, in whom the discretion to grant or refuse licenses for saloons was vested by municipal ordinance. The defendant thereupon continued to do business without a license, and was arrested, but was discharged by the United States Circuit Court (*In re* Christensen, 43 Fed. Rep. 243), on the ground that the ordinance in question was unconstitutional, since it made the granting of a license dependent upon the arbitrary consent of a certain designated number of persons. This decision has now been overruled by the supreme court. The court says it is undoubtedly true that it is the right of every citizen to pursue any lawful business, subject only to such restrictions as are imposed upon all persons of the same age, sex or condition, but that the possession and enjoyment of this right, and, indeed, of all rights, are subject to such restrictions as may be deemed by the governing authority essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the court says, is not unrestricted license to act according to one's own will, but is only freedom from restraint under conditions essential to the enjoyment of the same right by others. Regulations of the liquor traffic are only a part of a great body of rules varying with the nature of the business regulated, and their validity is to be decided on like general principles. Continuing, the court says:

It is urged that as the liquors are used as a beverage, and the injury following them, if taken in excess, is voluntarily inflicted, and is confined to the party offending, their sale should be without restrictions, the contention being that what a man shall drink, equally with what he shall eat, is not properly matter for legislation. There is in this position an assumption of a fact which does not exist—that, when the liquors are taken in excess, the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But, as it leads to neglect of business and waste of property, and general demoralization, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram-shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery is attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day, and the days of the week, on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the State is fully competent to regulate the business, to mitigate its evils, or to suppress it entirely. There is no inherent right in a citizen to sell intoxicating liquors by retail. It is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the State, or one which can be brought under the cognizance of the courts of the United States.

The view taken in this case is in harmony with previous decisions of the supreme court, but that tribunal has never before so clearly and emphatically proclaimed the inherent wickedness of liquor selling and the absolute authority of the State to curtail or suppress it. The man who engages in that traffic cannot, by any process of reasoning, place himself on an equal footing with citizens who sell other products. His business stands condemned as a dangerous one, and the courts are bound to regard it in the same light. When he obtains permission to carry it on, he must conform strictly to the conditions of the law.

NOTES OF RECENT DECISIONS.

NUISANCE—NEGLIGENCE—DEFECTIVE SIDEWALK.—The Supreme Court of Rhode Island, in Adams v. Fletcher, 20 Atl. Rep. 263, decide that a coal-hole in a sidewalk, constructed prior to any legislation on the subject, and not faulty in its construction or out of repair, is not, by reason of its construction and maintenance without a special license, a nuisance, making the owner of the property liable for injuries received by falling into the opening while it is being used by the lessee. Matteson, J., says:

It was agreed upon the hearing that the coal-hole in question was constructed prior to any legislation, State or municipal, relating to vaults under sidewalks and coal-holes. To entitle the plaintiff to recover against the defendant as the owner of the property, it must appear that the coal-hole was a nuisance at the time the property was leased to the tenant. Joyce v. Martin, 15 R. I. 558, 10 Atl. Rep. 620; Owings v. Jones, 9 Md 108; Rich v. Basterfield, 4 C. B. 783, 801; The case does not show that the coal-hole was faulty in its construction, or that it had become defective or out of repair so as to be dangerous to persons passing over it at the time of the demise. The plaintiff, however, claims that it was a nuisance because no license or authority from the public was obtained for its construction and maintenance. He cites several cases which apparently support this claim. Congreve v. Smith, 18 N. Y. 79; Congreve v. Morgan, *Id.* 84; Wendell v. Mayor, etc., 39 Barb. 329; Clifford v. Dam, 81 N. Y. 52. The doctrine of these cases is that the public are entitled to the street in the condition in which they have placed it; and whoever, without special authority, materially obstructs it, or renders its use hazardous, by doing anything upon, above, or below the surface, is guilty of a nuisance, and as in all other cases of public nuisance, individuals sustaining special damage from it, without any want of due care to avoid injury, have a remedy by action against the author or person continuing the nuisance; that no question of negligence can arise, the act being wrongful. He argues that as a sidewalk with a coal-hole in it is necessarily less safe than a sidewalk without such coal-hole, it is in the absence of special authority for its construction and maintenance a nuisance, and therefore the landlord is bound at his peril to keep such opening covered, so that the highway will be as safe as if it were not there. We infer from the cases cited, although the cases themselves do not show it, that in New York there had been, prior to the earliest decisions, some legislation placing the entire control of the streets in the municipal authorities, and forbidding the abutting owners from exercising, without special license or authority, the usual rights of such owner. If this inference be correct,

the cases were not like the present, since, in the present, as was conceded at the hearing, no such legislation existed when the coal-hole was constructed. If in the cases cited there had been such legislation, the reasoning of the courts seems unobjectionable; but, if not, we think that they unduly restrict the rights of the abutting owner of the street. In Fisher v. Thirkell, 21 Mich. 20, the court, after commenting on these New York cases, says: "We are satisfied that at common law the making of such excavations under sidewalks in cities, and the scuttles therein, for such purposes as this was made and used for were not treated as nuisances in themselves, or in any respect illegal, unless the walk was allowed to remain broken up for an unreasonable length of time, or the work was improperly or unsafely constructed, though it would afterwards become a nuisance if not kept in repair. Judging from the reported cases, the usage or custom of constructing such works in cities seems to have been in England, for a long period, as general as we know it has been in this country; and though we find many decided cases in the English books for private injuries caused by these structures being out of repair, and indictments for obstructing highways and streets in a great variety of ways, we have been cited to no English cases, and have discovered none, in which such works have been held illegal in themselves when properly and safely made, without any legislative permission, or that of the municipal authorities. Their legality seems, in all the cases, to have been assumed by the courts without any showing of such special authority, or any authority. They have been treated as nuisances when allowed to be out of repair, and private actions have frequently been sustained for injuries received in consequence; but we find no intimation of their original illegality, when safely and properly constructed." In Dillon's Municipal Corporations (volume 2, § 656*b*), the rights of the abutting owner and of the public in streets are thus defined: "The abutter is entitled as of right, subject to municipal and public regulation, to make any beneficial use of the soil of the street which is consistent with the prior and paramount rights of the public thereon for street purposes proper. The rights of the public to use the streets, not only for travel and passage, but for sewer, gas, water, and steam-pipes, and the like purposes, is of course paramount to any proprietary rights of the abutter. The abutter may, as a logical and necessary result, it is believed, whether the fee is in him or in the public, build as of right, under-ground house vaults in the streets, subject, of course, to the paramount right of the public for street uses proper, where the two rights come in competition, and subject, also, to reasonable legislative, municipal, or police regulations, as to location, mode of construction, and use of such vaults." And in a recent New Jersey case (Weller v. McCormick, 19 Atl. Rep. 1102) it is said: "The public right is paramount, and includes the right to have the streets safe for travel. That of the abutting owner is subordinate to this public right. He may use the highway in front of his premises, when not restricted by positive enactment, for loading and unloading goods, for vaults and chutes, for awnings, for shade trees, etc., but only on condition that he does not unreasonably interfere with the safety of the highway for public travel." And see, also, 3 Kent, Comm. 432; McCarthy v. City of Syracuse, 46 N. Y. 194. We are of the opinion that the want of a special license or authority to construct and maintain the coal-hole in question did not constitute it a nuisance, and we are also of the opinion that the rulings and instructions of the court to the jury at the trial were correct, and that a new trial should be denied, and the petition dismissed.

EVIDENCE — PHOTOGRAPHS — NEGLIGENCE. —The case of Kansas City, M. & B. Ry. Co. v. Smith, 8 South. Rep. 43, decided by the Supreme Court of Alabama, should be read in connection with the article which appeared in a recent issue of this JOURNAL on the subject of "Photographs as Evidence." (31 Cent. L. J. 414.) In that case it was held that a photograph of a trestle and wrecked train taken about two hours after the wreck, verified by the testimony of the photographer, is admissible in evidence to aid the jury in properly understanding the case. Somerville, J., says:

The photograph of the trestle and of the wrecked train of cars was shown to have been taken about two hours after the accident occurred, and was verified by the testimony of the photographer as being a correct representation of the locality and scene. It was clearly admissible in evidence to aid the jury in properly understanding the case. It is a well-understood rule, applied in every-day practice in the courts, that diagrams and maps illustrating the scene of a transaction, and the relative location of objects, if proved to be correct, are admissible in evidence in order to enable the jury to understand and apply the proved facts to the particular case. 3 Brick. Dig. p. 431, § 366. A plan, picture or other representation produced by the art of photography, is admissible on like principles, if verified as a true and accurate representation. It is, in fact, but a scientific reproduction of a *fac simile* of the original object in nature, by a mechanical art which is every day advancing towards perfection. The competency of such evidence was settled in Luke v. Calhoun Co., 52 Ala. 115, approving a like ruling in the case of Udderzook v. Com., 76 Pa. St. 340, where a photograph of a person in life, shown to be a correct picture, was admitted in evidence for the purpose of aiding in the identification of a deceased person alleged to have been murdered. The case of Ruloff v. People, 45 N. Y. 213, supports the same principle. In the case of Blair v. Pelham, 118 Mass. 420, which was an action against a town to recover damages for injuries caused by a defect in a highway, the defendant was permitted to put in evidence a photograph of the place of the accident, on its verification by the photographer as a true representation. So in Church v. City of Milwaukee, 31 Wis. 512, an action for damages resulting to a lot-owner from a change in the grade of a street, a photograph of the premises shown to be correct was admitted "to aid the jury in arriving at a clear and accurate idea of the situation of the premises, and enable them to better understand how they were affected by the changes in the grade." And Cozzens v. Higgins, 33 How. Pr. 436, decided by the New York Court of Appeals, is to the same effect. In an action of trespass against an adjoining proprietor, for the wrongful act of opening holes in the walls of the plaintiff's cellar, so as to render it untenable, by projecting into it heavy beams, a "photographic view" of the cellar was

admitted in evidence as "an appropriate aid to the jury in applying the evidence." The case of Dyson v. Railroad Co., 57 Conn. 10, 17 Atl. Rep. 137, is another authority directly in point, where, in an action for damages against a railroad company, a photographic view of the *locus in quo* of the accident was held to be admissible in evidence. The same ruling precisely was made in the case of Archer v. Railroad Co., 13 N. E. Rep. 318 (decided in 1887, by the New York Court of Appeals). We entertain no doubt as to the soundness of these rulings, and they fully support the action of the court in admitting in evidence the photograph of the wrecked train and surrounding locality in this case. 1 Whart. Ev. (3d ed.) § 676; Eborn v. Zimpelman, 26 Am. Rep. 319-321, note; Marcy v. Barnes, 16 Gray, 161; Locke v. Railroad Co., 46 Iowa, 109.

ADMINISTRATION—PROBATE—ESTABLISHING LOST WILL — PRESUMPTION.— The case of Behrens v. Behrens, 25 N. E. Rep. 209, decided by the Supreme Court of Ohio, is of interest on the subject of the establishment of lost wills. It was there held that where a will once known to exist and to have been in the custody of the testator, cannot be found after his decease, the legal presumption is that it was destroyed by the testator with the intention of revoking it, and that to strengthen such presumption it is competent to prove the declarations of the testator after making his will that he had destroyed or intended to destroy the same. Dickman, J., says:

In general, it may be assumed that a will is kept in the custody of the testator himself, or under his control, to be changed, modified, or revoked according to his good pleasure. If, at his decease, it cannot be found, it is more reasonable to presume that he himself has destroyed his will, than that some other person has committed the crime, and incurred the penalty of secreting or destroying it. In Betts v. Jackson, 6 Wend. 181, it is said by Chancellor Walworth: "Legal presumptions are founded upon the experience and observation of distinguished jurists as to what is usually found to be the fact resulting from any given circumstances, and the result being thus ascertained, whenever such circumstances occur, they are *prima facie* evidence of the fact presumed; and I have no doubt that five wills, made with all due formality, have been destroyed by the testators, either in secret or when no one was present to be a witness to prove the fact, to where there has been one destroyed or suppressed by fraud, or lost by time or accident, before the death of the testator." Indeed, it is now well settled, and is a principal of universal acceptance in both the English and American courts, that, where a will is proved to have once existed, and the testator retained custody of it, or had ready access to it, and it cannot be found after his death, a legal presumption is raised that the will was destroyed by him with the intention of revoking it. In the recent case of Collyer v. Collyer, 110 N. Y. 486, 18 N. E. Rep. 110, the rule is stated that when a will previously executed cannot be found after the death of the testator, there is a strong presumption that it was revoked by destruction by the testator, and this presumption stands in the place of positive proof. See, also, Redf. Wills, 329; 1 Williams, Ex'rs, 157, and cases cited; 2 Amer. Lead. Cas. (5th ed.) 510; Foster's Appeal, 87 Pa. St. 67; Minkler v. Minkler, 14 Vt. 125; Betts v. Jackson, *supra;* Minor v. Guthrie (Ky.), 4 S. W. Rep. 179; Hatch v. Sigman, 1 Dem. Sur. 519; 1 Jarm. Wills, (5th. Amer. ed.) 290, and cases cited; Wargent v. Hollings, 4 Hagg. Ecc. 245; Lillie v. Lillie, 3 Hagg. Ecc. 184. Such a presumption of recovation may be overcome by circumstantial or other proof to the contrary. It may be rebutted by showing that the testator had no opportunity to revoke, and that his will was destroyed after his death. And for this purpose, declarations of the testator to various members of his family down to a few days before his death, expressive of his satisfaction at having settled his affairs, and intimating that his will was left with his attorney, have been held to have been properly admitted. Whiteley v. King, 17 C. B. (N. S.) 756; Keen v. Keen, L. R. 3 Prob. & Div. 105; *In re* Johnson's Will, 40 Conn. 587. But while the declarations of the testator may be used to weaken the presumption that he has destroyed his will with the intention of revoking it, his declarations may also be received as evidence to strengthen and fortify the presumption that he has destroyed his will with such intention. Whether it be the making of a will or the destroying of one, the competency of the testator's declarations as evidence is alike in each case, and for the same reasons admissible. Collagan v. Burns, 57 Me. 465. In Keen v. Keen, *supra*, in order to rebut the presumption of revocation arising from a will which was in a testator's possession not being found after his death, evidence was produced of declarations by the testator showing an intention to adhere to the will. The court held that evidence of declarations of an intention not to adhere to the will, produced by the opponents of the will, was admissible to contradict the evidence of adherence, whatever might be the form of words in which such intention was expressed, and therefore that a declaration by the testator that he had burned his will was admissible, not as evidence of the fact of destruction, but as evidence of intention. Sir J. Hannen, in his opinion in the case, says: "I think there can be no doubt that, while on the one hand evidence of statements, made by a testator subsequent to the execution of a will, that he intends to act in conformity with the disposition contained in the will, is clearly admissible, it necessarily follows that other statements made by the testator, to a contrary effect, must also be admissible. The admissibility of such evidence cannot depend on the form of words in which the intention is expressed. Therefore a statement by a testator that he has altered his mind as to the disposition of his property, and that he has therefore destroyed his will, although it may not be evidence of the fact of destruction of the will, is evidence of intention from which the fact of destruction may be inferred, there being other circumstances leading to the same conclusion." In Lawyer v. Smith, 8 Mich. 412, after the death of the testatrix, a will 25 years old was discovered, which was either torn or worn in several pieces. Whether the injury to the instrument was done by the testatrix or by some other person, and, if by her, whether accidently or intentionally, and for the purpose of revoking the will, were held to be questions of fact for the jury; and to aid them in determining these questions, and not as separate and independent evidence of a revocation, the declarations of the testatrix, made after the date of the will, that she had destroyed it, were held to be competent evidence. In Patterson v. Hickey, 32 Ga. 156, it was decided that, where the question is *revoca-*

vit vel nol parol evidence, as to the acts and declarations of the testator, are admissible, although made at any time between the making of the will and the death of the testator. A will is said to be ambulatory until the testator dies. Until his death the instrument has no force or effect, and, until then, he has the power to cancel or revoke it. If, from being clothed with this power, the presumption arises after his death that he destroyed his will, that presumption will be aided by his declarations as expressive of his feelings and intention. In Weeks v. McBeth, 14 Ala. 474, it was held that the declarations of the testator were admissible to strengthen the presumption of revocation, and to show that the will was destroyed by the testator *animo revocandi*. And it was there stated as the invariable rule in the courts of England to admit the declarations of the testator, either to strengthen, or to repel the presumption of revocation, arising from the non-production of the will after the death of the testator, or to explain the act of destroying or conceling it. The case of Smiley v. Gambill, 2 Head, 164, was a contest upon the will of Margaret Stewart. The testatrix burned a paper which she believed was her will, and died in that belief. This was proved by her uniform declarations, and by her acts in disposing by deeds of some of the same property named in the will, and in applications made to write another will for her, on the ground that she had destroyed the first. Caruthers, J., in delivering the opinion of the court, said that, if the jury believed as a matter of fact that Mrs. Stewart burned a paper which she thought was her will, although it was not, with the intention of revoking by its destruction, and honestly believed that she had done it, and continued in that belief without any subsequent recognition or even knowledge of its existence, the paper propounded would not be her will. As testimony bearing on this question, her declarations alone might not be sufficient, but they were competent, and it would be for the jury to determine whether they, together with other facts proven, made out the fact of burning, or intention to do so, by the act done. The strongly expressed conclusion of the court in Reel v. Reel, 1 Hawks, 248, is in accord with citations already made: "To reject the declarations of the only person having a vested interest and who was interested to declare the truth, whose fiat gave existence to the will, and whose fiat could destroy, and in doing the one or the other could interfere with the rights of no one, involves almost an absurdity; and they are received, not upon the ground of their being a part of the *rés gestæ*, for whether they accompany an act or not, whether made long before or long after making the will, is entirely immaterial as to their competency. Those circumstances only go to their weight or credit with the tribunal which is to try the fact." See, also, Collagan v. Burns, *supra;* Tynan v. Paschal, 27 Tex. 286; Youndt v. Youndt, 3 Grant, Cas. 140.

SEDUCTION -EVIDENCE—VIRTUOUS UNMARRIED FEMALE.—In O'Neill v. State, 11 S. E. Rep. 856, the Supreme Court of Georgia construe what is meant by "a virtuous unmarried female" within the terms of a statute declaring it penal to seduce such a female. Bleckley, C. J., says:

The opinion of Judge McCay, as expressed in Wood v. State, 48 Ga. 289, was that the question of what is a virtuous woman ought to be left in each case to the jury; but the other two members of the court presiding in that case were of a different opinion. The charge to the jury then under review was in these terms: "The presumption of law is that the female alleged to have been seduced was virtuous, and that presumption remains until removed by proof. She must have had personal chastity. If she, at the time of the alleged seduction, had never had unlawful sexual intercourse with man, if no man had then carnally known her, she was a virtuous female within the meaning of the law. If man had then carnally known her, had had sexual intercourse with her, she is not a virtuous female within the meaning of the law." This charge, in its totality, was expressly approved by Judge Trippe and Chief Justice Warner. See pages 299, 304. These two judges being a majority of the court, their concurrence made the judgment of the court on the question involved, and, nothing to the contrary having been decided, his honor, Judge Winn, was mistaken in leaving it to the jury to say what a virtuous woman is. In so doing he was conforming to the individual opinion of one member, but going directly counter to the decision of the court; a decision in which all the members of the court, as now constituted, fully concur. We think that in contemplation of law, including the penal statute on the subject of seduction, every virgin, without exception, is virtuous. This is a plain, practical standard by which to test the chastity to which the law looks in classifying females who have never been married, and who have not been deprived of their virginity by violence or force without their consent. Of course, a different standard would have to be adopted in classifying women who have been married, such as widows and divorced wives. Possibly, also, a fallen woman who has reformed and been redeemed, and who has proved her redemption by years of abstinence and repentance, might stand on the footing, if not of a virgin, of a chaste widow. But for the purpose now in hand, we need not enter upon the consideration of exceptional cases. The broad, general rule is enough, that unmarried females who are virgins are virtuous, and those who, by their own consent, have ceased to be virgins are not virtuous. This is the rule which should have been given in charge to the jury in the present case. It is for the court to construe the word "virtuous" as used by the statute, and the jury should receive and abide by that construction as decisive.

But while the jury have no right or power to decide that a virgin is not a virtuous woman, it is their province, and theirs alone, to decide, from the evidence whether the female alleged to have been seduced was a virgin at the time she yielded her person to the accused. And upon this question all facts and circumstances tending to show a debauched mind, such as lewd conduct and behavior before that time, may be considered; for the jury need not have direct or positive evidence of her previous connection with some other person, but only such evidence as satisfies them that she has parted with her virginity. Of this opinion were all the judges who presided in Wood v. State, *supra*. Judge Trippe (page 299) said: "The proof of lascivious indulgences and wanton dalliances, with other evidence short of direct proof of the overt act, may authorize a jury to infer actual guilt, the illicit act." Judge Warner (pages 307, 308) said: "When a defendant is indicted on the criminal side of the court for seducing a virtuous unmarried female, it is not a good legal defense for him to blackball her character by proving loose declarations, imprudent or immodest conduct on the part of his victim; but he

must go further and prove that she had lost her personal chastity, prior to his alleged seduction of her, or he must prove such facts as, under the law, would raise a violent presumption that she had done so, such facts as, under the law, would authorize a jury to find that she had had unlawful sexual intercourse with a man." In these views we concur. The jury should pronounce the woman not virtuous upon any evidence, direct or circumstantial, which convinces their minds that she had previous illicit sexual intercourse; but without such evidence they should treat her as virtuous for in contemplation of law she is so.

ADMISSION OF DECLARATIONS OF A TESTATOR IN PROOF OF WILLS—MENTAL CAPACITY.

Mental Capacity.—The first requisite to be established in the proof of wills is: Was the testator of sufficient capacity to make a will? On this question of capacity there is nothing so competent in evidence as the statements made by the testator. They are the medium by which the court can come in contact with his mind; to judge of the ability of that mind to transact the business demanded of it. And courts are unanimous in holding that the mental capacity may always be shown by the declarations of the testator;[1] but when admitted for that purpose, they are merely taken as mental acts or conducts. They are not received as evidence of the fact stated, but only to show the manner and capacity of the man who made them.[2] A state of mind once proved to exist, it is the common observance and experience that it has existed for some time, and will continue; on this principle subsequent declarations have been admitted to prove the mental fact in dispute, but they must relate to a state of mind in some degree permanent, and be not too remote in time.[3] For this reason they would seem to be of equal weight as prior declarations, if no further removed in point of time from the execution of the instrument, and may be quite as influential with the jury.[3a] It is not necesary, in showing mental capacity, that the statements allude strictly to the disposal of the property of the testator, or in any way relate to the will, as it is not the truth of the statement that is sought, but simply the matter of capacity—sufficient ability on the part of the testator to make his will. Any remark, however remote, indicating his mental status, is admissible.[4]

Mistake, Fraud, and Undue Influence—Declarations at, or so near the time of the execution of the will as to form a part of the *res gestæ*, are admissible[5] to prove mistake, fraud, or undue influence. Eight days has been held not too remote to form a part of the *res gestæ*.[6] Also where the declarations are evidence of one continuous act down to the time of the execution of the will.[7] They are not admissible to prove the simple external facts of fraud, mistake, or undue influence.[8] But they are competent in evidence to show the effect that those external facts had upon

[1] Waterman v. Whitney, 11 N. Y. 157; Dan v. Brown, 4 Cowen, 483; Comstock v. Hadlyme, 8 Conn. 254; Boylan v. Meeker, 4 Dutcher, 274; Shailer v. Bumstead, 99 Mass. 112; Davis v. Davis, 123 Mass. 590; Robinson v. Hutchinson, 26 Vt. 38; Moritz v. Brough, 16 S. & R. 402; Rambler v. Tryon, 7 S. & R. 94; McTaggart v. Thompson, 14 Pa. St. 149-154; Hayes v. West, 37 Ind. 21; Colvin v. Warford, 20 Md. 390-1; Stevens v. Vancleve, 4 Wash. C. C. 262; Durand v. Ashmore, 2 Rich. 184; Provis v. Rowe, 5 Bing. 435; Marston v. Fox, 8 Ad. & El. 14. 3 Leading cases Eq. 503 note (3 Am. ed.); 1 Redf. Wills, 551-561.

[2] Shailer v. Bumstead, 99 Mass. 112; Waterman v. Whitney, 11 N. Y. 157.

[3] Shailer v. Bumstead, 99 Mass. 112, Waterman v. Whitney, 11 N. Y. 157.

[3a] Shailer v. Bumstead, 99 Mass. 112; McTaggart v. Thompson, 14 Pa. St. 159; Boylan v. Meeker, 4 Dutcher, 274; Hayes v. West, 37 Ind. 21.

[4] Shailer v. Bumstead, 99 Mass. 112; Waterman v. Whitney, 11 N. Y. 157; Smith v. Fenner, 1 Gall. 170; Stevens v. Vancleve, 4 Wash. C. C. 262; Grant v. Thomas, 4 Conn. 203; Dennison's Appeal, 29 Conn. 399; Dickinson v. Barber, 9 Mass. 255; Thomas v. Thomas, 6 Durn. & E. 671; Doe v. Allen, 12 Ad. & El. 451; 1 Jarman, 408.

[5] Smith v. Fenner, 1 Gallison, 170; Runkle v. Gates, 11 Ind. 95; Roberts v. Travick, 13 Ala. 68; Haynes v. Rutter, 24 Pick 242; Rawson v. Haight, 2 Bing. 104; Waterman v. Whitney, 11 N. Y. 157.

[6] Smith v. Fenner, 1 Gall. 170.

[7] Taylor v. Kelly, 31 Ala. 59; Blakey's Heirs v. Blakey's Exr's., 33 Ala. 611; Comstock v. Hadlym, 8 Conn. 254; Dennison's App., 29 Conn. 399, when made a long time prior; Stevens v. Vancleve, 4 Wash. C. C. 265; Robinson v. Hutchinson, 26 Vt. 38; Shailer v. Bumstead, 99 Mass. 112; Provis v. Rowe, 5 Bing. 435; Redf. Am. Cases on Wills, 265 & 397.

[8] Roberts v. Travick, 13 Ala. 68; *In re* Will of Pemberton, 4 Atl. Rep. (N. J.) 770; Est. of Brooks, 54 Cal. 471; Comstock v. Hadlym, 8 Conn. 254; Kinne v. Kinne, 9 Conn. 102; McTaggart v. Thompson, 14 Pa. St. 159; Moritz v. Brough, 16 S. & R. 403; Rambler v. Tryon, 7 S. & R. 94; Smith v. Fenner, 1 Gall. 170; Jackson v. Kniffen, 2 Johns. Rep. 31; Ryerss v. Wheeler, 22 Wend. 148; Waterman v. Whitney, 11 N. Y. 157; Williams v. Freeman, 83 N. Y. 561; Phillips v. McCombs, 53 N. Y. 494; Boylan v. Meeker, 1 Dutcher, 274; Richardson v. Richardson, 35 Vt. 238; Shailer v. Bumstead, 99 Mass. 112; Runkle v. Gates, 11 Ind. 95; Stevens v. Vancleve, 4 Wash. C. C. 265; Thomas v. Thomas, 6 Durn. & E. 671; Provis v. Rowe, 5 Bing. 435; Pemberton v. Pemberton, 13 Vesey, 101.

the mind of the testator.[9] Keeping this distinction in mind, the apparent inconsistency of different decisions passes away. When the precise state of the testator's mind is ascertained, it goes a great way to determine how susceptible it would be to the attempts of fraud, or be influenced by interested parties, and how far the instrument in question is the result of these attempts, or is the offspring of free, voluntary action on the part of the testator. In some few cases the declarations have been admitted to prove external facts of fraud.[10] Statements made prior to the execution of the will are competent to prove a previous state of mind.[11] They are admissible to prove the condition of the mind, but not undue influence.[12] Also where the issue is fraud and undue influence, declarations made within a reasonable time before and after the execution of a will, are admissible to show the condition of the testator's mind.[13]

Intention.—In Shailer v. Bumstead, 99 Mass. 112, the court refers to the matter by way of argument, and says: "Intention, purpose, mental peculiarity and condition, are mainly ascertainable through the medium afforded by the power of language." But this broad statement, if limited to cases where ambiguity or equivocation exists, or the description will apply with legal certainty to several subjects, or the words have no clear and definite meaning for these purposes, whether the statements are made prior or subsequent to the execution of the will, they are admissible.[14] Some courts have gone further, and hold that they may be admitted to show his declared intention, the meaning he intended to convey by the use of words and phrases, when used idiomatically, or to explain a bequest, if he had previously intimated that he should make that particular bequest.[15] Declarations, written or oral, made by the testator after the execution of his will, in the event of its loss, are admissible to prove not only that it was not cancelled, but also as secondary evidence to prove its contents.[16] Statements of a testator, proving or tending to prove a fact collateral to the question of intention, where such facts would aid in the interpretation of the testator's words, are admissible; but not if they relate directly to that point.[17] They are not admissible to show that the testator meant his will should remain in force against a revocation implied by law.[18] But when accompanied by some act of revocation, they are admissible to show intention to revoke.[19] They are not competent to show the intended use and meaning of particular words or phrases, or how he used well settled terms of law.[20] But they may be admitted to show whether a legacy bequeathed by the testator was intended to redeem a debt or not.[21] Declarations are not admissible by way of intention to explain a will, or that he intended to alter it;[22] or that he made no will;[23] or that certain persons only were named in the will.[24]

Construction and Revocation.—The general rule of the law is, that no words in parol made by the testator will be admitted in evidence to affect, enlarge, control, or in any way modify or revoke a will. The construction must be gathered from the will itself taken as a whole. Statements of the testator, when accompanied by some acts which, if completed would amount to a revocation, are admissible to show that a revocation was in-

[9] Shailer v. Bumstead, 99 Mass. 112; Potter v. Baldwin, 133 Mass. 427; Cudney v. Cudney, 68 N. Y. 148.

[10] Hester v. Hester, 4 Dev. 228; Howell v. Barden, 3 Dev. 442; Reel v. Reel, 1 Hawks, 248; Jackson v. Kniffen, 2 Johns Rep. 31 (Spencer J. opinion); Roberts v. Travick, 13 Ala. 68; Roberts v. Travick. 17 Ala. 55.

[11] Thompson v. Ish (Mo.), 12 S. W. Rep. 510.

[12] Middleditch v. Williams (N. Y.), 17 Atl. Rep. 826; Jackson v. Kniffen, 2 Johns. Rep. 31; Waterman v. Whitney, 11 N. Y. 157.

[13] Herster v. Herster (Pa.), 16 Atl. Rep. 342, S. C. 122 Pa. St. 239.

[14] In the matter of Page, 118 Ill. 576; Bradley v. Reese, 113 Ill. 327; Clark v. Smith, 34 Barb. 140; Trustees v. Peaslees, 15 N. H. 317; Wooton v. Redd's Exr's., 12 Gratt. 196; Morgan v. Burrows, 45 Wis. 211; Sherwood v. Sherwood, 45 Wis. 351; Moritz v. Brough, 16 S. & R. 403; Cheney's Case, 5 Cokes Rep. 68.

[15] Shailer v. Bumstead, 99 Mass. 112; Harris v. R. I. Hospital Co., 10 R. I. 313; Rutland v. Rutland, 3 P. Wms. 209; Longham v. Sanford, 19 Vesey 649. *Contra*, Wood v. Hammond (R. I.), 17 Atl. Rep. 324.

[16] Dickey v. Malechi, 6 Mo. 177; Hope's Appeal, 48 Mich. 518.

[17] Greenleaf Ev. § 291.

[18] Marston v. Fox, 8 Ad. & El. 14.

[19] Doe v. Perkes, 3 B. & Ald. 489; Doe v. Harris, 6 Ad. & El. 209; Boylan v. Meeker, 4 Dutcher, 274.

[20] Aspedus Estate, 2 Wall. 368; Gregory v. Cowgill, 19 Mo. 415; Allen v. Allen, 18 How. U. S. 385; Greenleaf Ev. § 291.

[21] 2 Story Eq. Juris. § 1119-1123; Redf. Wills pt. 2, § 28.

[22] Williams v. Freeman, 83 N. Y. 561; Smith v. Fenner, 1 Gall. 170; Brown v. Saltonstall, 3 Met. 423.

[23] Cawthorn v. Haynes, 24 Mo. 236.

[24] Bradley v. Bradley, 24 Mo. 311.

tended.[25] Words of revocation penciled on a will by the testator, unless subscribed and attested in the proper manner, will not work a revocation of the instrument.[26] The words of a testator that "he never made the will," "never signed it," or "did it while he was drunk," and words to like effect, are not admissible to prove a revocation of the will, or to defeat it.[27] The declarations of a blind person are admissible to show that he knew the contents of the will.[28] It having been shown that a will had been executed, declarations to the effect that a will had been made, and that the property had been given to R, are competent to repel the presumption of a revocation.[29]

EDWARD H. PARK.

Denver, Colorado.

[25] Will of Mary P. Ladd, 60 Wis. 187; Sherwood v. Sherwood, 45 Wis. 357; Cawthorn v. Haynes, 24 Mo. 236; Gregory v. Cowgill, 19 Mo. 415; Bradley v. Bradley, 24 Mo. 311; Clark v. Smith, 34 Barb. 140; Betts v. Jackson, 6 Wend. 173; Jackson v. Kniffen, 2 Johns. 31; Dan v. Brown, 4 Cowen, 483; Jackson v. Betts, 6 Cowen, 377; Waterman v. Whitney, 11 N. Y. 167; Barrett v. Wright, 13 Pick. 45; Farrer v. Ayres, 5 Pick. 404; Osborn v. Bradley, 7 Met. 301; Brown v. Saltonstall, 3 Met. 423; Tucker v. Seaman's Aid Society, 7 Met. 188; Warren v. Gregg, 116 Mass. 304; Avery v. Chapel, 6 Conn. 270; Wells v. Est. of Wells, 37 Vt. 483; Haynes v. West, 37 Ind. 21; Colvin v. Warford Lessee, 20 Md. 357; Bradley v. Reese, 113 Ill. 327; Dan v. Vancleve, 5 N. J. L. 655; Stevens v. Vancleve, 4 Wash. C. C. 262; Smith v. Fenner, 1 Gall. 170; Rutland v. Rutland, 2 P. Wms. 214; Provis v. Rowe, 5 Bing. 435; Granvill v. Beaufort, 2 Vernon, 624; Bibb v. Thomas, 2 W. Blk. 1044.

[26] Will of Mary P. Ladd, 60 Wis. 187.

[27] Reel v. Reel, 1 Hawks, 248-268-269; Howell v. den, 3 Dev. 442; Patton v. Allison, 7 Humph. 320; wthorn v. Haynes, 24 Mo. 227; Roberts v. Travick, Ala. 55; Gamble v. Gamble, 39 Barber 373; Hand v. Hoffman, 3 Halst. 71; Wooton v. Redd's Exr's., 12 Gratt 196; Kelley v. Kelley, 25 Pa. St. 460.

[28] 12 Rich. S. C. 604.

[29] *In re* Marsh's Will, 45 Hun. 107.

CONSTITUTIONAL LAW—CONSEQUENTIAL INJURIES—DAMAGES—EVIDENCE.

GAINESVILLE, H. & W. R. CO. V. HALL.

(Supreme Court of Texas, June 24, 1890.)

1. *Constitutional Law—Consequential Injuries—Damages Resulting from Operation of Railroad.*—Under the Texas constitution, art. 1, § 17, providing that "no person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made," damages may be recovered for diminution in the value of property caused by noise, smoke, and vibration resulting from the operation of a railroad near the property, although not upon the same nor along a highway.

2. *Evidence—Value—Opinion.*—The plaintiff, while testifying as a witness on his own behalf, was asked: "To what amount, if any, is your property depreciated in market value by reason of the construction of the defendant's railroad?" *Held* improper, but as the question was answered in such a way that the result was the same as if the witness had been asked the value of the property before the railroad was built and its value afterwards, the error was harmless.

GAINES, J.: This action was brought by appellee against the appellant corporation to recover damages to certain real estate alleged to have been caused by the construction of the defendant's railroad, and the operation of its trains. The plaintiff's property consists of a lot in the suburbs of the city of Gainsville, upon which he resides with his family, and has a dwelling-house and other improvements appropriate to a place of residence. The dwelling-house stands 26 feet from the south boundary line of the lot. The defendant company took no part of plaintiff's land, but constructed its road parallel to such line at a distance from it of about 37 feet. The damages were claimed by reason of the vibration, noise, smoke, and noxious vapors and cinders incident to the running trains over the road. The court charged the jury in effect to find for the plaintiff if his property had been damaged by the construction and operation of defendant's road, provided such damage resulted from the vibration, smoke, noxious vapors, and the noise of passing trains; and that they should not take into consideration any damage plaintiff had suffered in common with the community generally. The defendant asked the court give the following charge, which was refused: "The mere construction and operation of the railroad of defendant upon land adjoining plaintiff's premises, and in the proper and usual manner in which railroads are built and operated, was not an unlawful act, nor could it be denominated a nuisance, and the inconvenience to plaintiff or the owner of the premises from such vibration, noise, and smoke as were incident to the ordinary operation of the railroad, by running from four to six trains per day past plaintiff's premises, does not give him a cause of action for damages, or depreciation in the value of his premises occasioned thereby. You are therefore instructed to return a verdict for the defendant."

The giving and refusal of these instructions, respectively, present the fundamental question in the case, and involve the construction of that portion of our present constitution which provides that "no person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person." Article 1, § 17. The precise question made by the facts of this case is one of the first impression in this court. In Railway Co. v. Fuller, 63 Tex. 467 damages were allowed the plaintiff for an injury to his property resulting from the construction and operation of the defendant's railroad along a street in front of his lots. The plaintiff having

an easement in the street peculiarly essential to the full enjoyment of his property, the court held that the appropriation of the street was a taking within the meaning of the constitution. But the court also say: "If, however, there has been no taking of the property of the appellee within the meaning of the constitution, there can be no doubt that it has been damaged, if the evidence offered to support the averments of the petition be true. The word 'damaged' is evidently used in the sense in which the word 'injured' is ordinarily understood. By 'damage' is meant every loss or diminution of what is a man's own, occasioned by the fault of another, whether this results directly to the thing owned or be but an interference with the right which the owner has to the legal and proper use of his own. If by the construction of a railway or other public work an injury peculiar to a given property be inflicted upon it, or its owner be deprived of its legal and proper use, or of any right therein or thereto—that is, if an injury, not suffered by that particular property or right in common with other property or rights in the same community or section, by reason of the general fact that the public work exists, be inflicted—then such property may be said to be damaged." In Railway Co. v. Eddins, 60 Tex. 656, the same question was decided in the same way. The cases cited differ from the case before us in the respect that in each of them the street in front of the property damaged was appropriated, while in this the road was not constructed along or over any public highway adjacent to the plaintiff's lot. We think the language quoted from the opinion in the Fuller Case lays down the true rule. The use of the disjunctive conjunction in the provision of the constitution under consideration indicates clearly that it was not necessary that there should be a taking to entitle the owner of property to compensation for any special damage that might result to it from the construction of a public work. In Railway Co., v. Meadows, 73 Tex. 32, 11 S. W. Rep. 145, this subject came up for consideration, and the court say: "If a railroad company condemned or otherwise acquired for its purposes a right of way over land, and in constructing its road did an act injurious to an adjacent or neighboring proprietor, for which, if done by the original owner, he would have been responsible at common law, the company should be held liable to compensate the proprietor so injured. We do not understand that it was intended to give an action against those constructing public works for acts which if done by persons in pursuit of a private enterprise would not have been actionable." There is high authority for holding that the charter of a railroad company, even in the absence of a statutory or constitutional law allowing compensation for incidental damage, does not exempt it from suits by persons whose property is injuriously affected by its works, although it be properly constructed, and carefully operated, at least in cases where in pursuance of its charter the works of the corporation could have been so located as to avoid the injury. Baltimore, etc., R. Co. v. Baptist Church 108 U. S. 317, 2 Sup. Ct. Rep. 719. The doctrine as above qualified may be sustainable; but the great weight of authority is to the effect that in the absence of constitutional restrictions the legislative grant legalizes all acts done in strict pursuance of the power conferred, and that persons whose property has been damaged, but not taken, must suffer the loss. If the power does not confer authority to do the act despite the damage, it would be the right of an owner whose property was injuriously affected by the operation of a railroad to enjoin such operation as a nuisance, and thus defeat the grant. We think that the intention of the words "damaged or destroyed" in the provision of the constitution under consideration was at all events intended to obviate any question of exemption from liability to the owner for property injuriously affected by a public work, and to provide a remedy for any damage which in such cases the legislature might authorize to be inflicted. It is sufficient for the determination of this case to say that it was certainly intended that the legislature should not authorize a corporation to do an act for a public use which, if done by an individual without legislative sanction, would be actionable, and at the same time exempt it from liability to respond in damages to the owner whose property had been injured. Such was the opinion expressed in the case of Railway Co. v. Meadows, previously cited.

We are then brought to the inquiry whether or not the carrying on of any business by a natural person upon his own land, which by reason of the noise, smoke, and vibration caused by the operation of powerful machinery materially diminished the enjoyment of the property of another, and rendered it less desirable as a residence, and depreciated its market value, is a nuisance at common law. The doctrine announced in Burditt v. Swenson, 17 Tex. 489, leads inevitably to the conclusion that it is. In that case the court quote Blackstone, who says: "If one does any * * * act in itself lawful, which being done in that place necessarily tends to the damage of another's property, it is a nuisance." That a nuisance may be created by smoke, noise, noxious vapors, or other physical disturbance of the enjoyment of property is a proposition in accordance with sound principles, and is well supported by authority. Baltimore, etc., R. Co., v. Baptist Church, *supra;* Wood, Nuis. § 611, and cases cited; Railroad Co. v. Esterle, 13 Bush, 667; Railroad Co. v. McComb, 60 Me. 290.

There was evidence in this case tending to show that by reason of the noise, smoke, and vibration produced by the operation of the defendant's road the plaintiff's property had been greatly diminished in value. The following is the rule laid down by an eminent English judge as applicable to cases like this: "When by the

construction of any works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of in connection with such property and which gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation if by reason of such interference the property, as property, is lessened in value." Board v. McCarthy, L. R. 7 H. L. 243. The charge of the court was in accordance with those principles, and was not erroneous. The charge requested was based upon contrary principles, and was properly refused. We deem it proper before leaving this subject to comment briefly upon the case of Railway Co. v. Brand, L. R. 4 H. L. 171, upon which appellant seems mainly to rely for a reversal of the judgment. In its decision a great amount of labor and a great wealth of learning was expended. The plaintiff's claim in that case was precisely like the claim in this. The court of queen's bench held that the plaintiff was not entitled to recover. Brand v. Railway Co., L. R. 1 Q. B. 130. This judgment was reversed in the exchequer chamber (L. R. 2 Q. B. 223), but upon final appeal to the house of lords was sustained. Four of the five judges who were cited to advise the lords were of the opinion that the plaintiff was entitled to recover; and in that opinion one of the lords concurred. Two of the law lords held the contrary opinion, and the house gave judgment accordingly. The important fact, however, is that the decision of the case turned upon the construction of the acts of parliament which allowed compensation to owners where lands were taken or injuriously affected by the construction of public works. The question was whether compensation was intended to be allowed only for damages accruing from the construction of the works, or whether it included also such damages as resulted from the operation of the trains after the works had been constructed. The damages in the case were clearly of the latter character, and each of the judges who gave an opinion against the right of compensation placed it distinctly upon the ground that the acts of parliament commonly called the "Land Clauses Act" and the "Railway Clauses Act" gave compensation only for such damages as resulted from the construction of the railroad, and not from the operation of its trains. The decision of the case was made to depend purely upon a matter of verbal construction. All the judges conceded that the plaintiff's property had been injuriously affected, and that if the language of the statutes had been broad enough to embrace damages resulting from the operation of the works the plaintiff would have been entitled to recover. In the case of Board v. Mc Carthy, above cited, the damages claimed resulted from the construction of the works, and the right of recovery was maintained in the common pleas, in the exchequer chamber, and in the house of lords. L. R. 7 C. P. 508, L. R. 8 C. P. 191, and L. R. 7 H. L. 243. The question was again considered, and the doctrine of the case last cited affirmed, in Railway Co. v. Walker's Trustees, L. R. 7 App. Cas. 259. There is no such difficulty under the provision of our constitution as was presented in the construction of the English statutes. The language, "no person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made," is sufficiently comprehensive to include damages resulting from the operation of public works, as well as those which are inflicted by their construction merely. The property in this case was damaged for a public use by the operation of the railroad, and the damage comes as clearly within the provision the constitution as damages which result immediately from the construction of the oad. The property is subjected to a perpetual servitude for the benefit of the public, and the owner is entitled to his compensation for his damage. The following American cases bear upon the question we have been considering, and support the conclusion we have announced: Bridge Co. v. Geisse, 35 N. J. Law, 558; Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. Rep. 820; Rigney v. Chicago, 102 Ill. 64; Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317; Railroad Co. v. Ayres, 106 Ill. 511; Railroad Co. v. Williamson, 45 Ark. 429.

During the progress of the trial the following question was propounded to plaintiff on his behalf while being examined as a witness, as well as to his other witnesses: "To what amount, if any, is your property depreciated in market value by reason of the construction and operation of defendant's railroad, taking into consideration the physical disturbances to said property only, if any, such as noise, smoke, noxious vapors, and vibrations, and excluding from your consideration all damages and inconveniences sustained in common with the community at large?" The question was objected to by the defendant on the ground that it called for the opinion of the witness upon a matter involving a mixed question of law and fact. We think that the question was improper, and that the objection should have been sustained. But in so far as the answer of the plaintiff was concerned no harm resulted to the defendant. He did not give a direct response to the question, but answered that the market value of the place was almost totally destroyed; that without a railroad it would be worth at a low estimate $4,000, and its value was decreased from the causes enumerated from one-half to three-fourths of that amount. The result was the same as if the witness had been asked the value of the property before the railroad was built and its value afterwards, and the cause of the depreciation in value, if any, and had answered it was worth, before the construction, $4,000, but since the construction was not worth more than $1,000 or $2,500, and the cause of the decrease was the noise,

smoke, and vibration caused by the moving trains. Neither the bill of exceptions nor the statement of facts shows the answers of the the other witnesses to the question, and without knowing what the answers were we cannot say whether the defendant was prejudiced or not. They may have answered that in their opinion there was no damage. We find no reversible error in the record, and the judgment is affirmed.

NOTE.—1. *Taking, Injuring and Destroying Property—Compensation.*—It is difficult to determine from the opinion in the principal case whether the court meant to hold that the injury to the appellee's property amounted to a "taking" or not. In one place it is said that "it was not necessary that there should be a taking to entitle the owner of the property to compensation for any special damage that might result to it from the construction of a public work." In another place it is said that "the property is subjected to a perpetual servitude for the benefit of the public, and the owner is entitled to compensation for his damages." This last statement would indicate that the court considered the injury sufficient to constitute a "taking." But it was, perhaps, unnecessary to decide this question as the court seems to have been of the opinion that the property owner was entitled to compensation, under the constitution, in either case. A similar ruling was made under a like constitution, in a recent case, by the Supreme Court of Nebraska.[1]

Actual manual possession is not necessary to constitute a taking. "A change of title, the destruction of a substantial right, immediately and directly resulting from a public work, the subjection of the land to an easement or any other burden incompatible with the dominion of the owner, or the serious interference with the use or enjoyment, of property, will be deemed a taking within the meaning of the organic law."[2]

It is the rule in nearly all of the States that merely consequential damages cannot be recovered in the absence of a constitutional or statutory provision to that effect,[3] and while damages which naturally and proximately result from the construction and operation of a railroad are properly recoverable, remote and purely speculative damages are not.[4] But in many of the States it is now provided that consequential damages may be recovered in certain cases.[5] It may be profitable to review some of the decisions under these provisions. Many of the State constitutions provide that no property shall be "taken or damaged" without just compensation, and it is generally held that actual damages which diminish the value of the property" are included in such provisions.[6] On the other hand it is held in Pennsylvania that the constitutional provision requiring just compensation for property "taken, injured or destroyed" includes only such legal wrongs as might have been the subjects of an action for damages at common law, and that no recovery can be had thereunder for consequential injuries such as noise, smoke and the jar of passing trains, where the land itself is not taken.[7]

It is now well settled that a railroad cannot be constructed in a street in such a manner as to materially interfere with the abutter's right of access without compensation therefor,[8] although it is otherwise if the railroad is on the opposite side of the street and does not become a nuisance.[9] If the street is used as a terminal yard or the road is so operated as to become a nuisance by which the abutter is especially injured, he may recover damages therefor or have it enjoined as a nuisance.[10] In the famous New York "elevated railroad cases" the doctrine that the deprivation of the easement of access amounts to a "taking" of property for which compensation must be made under the constitution was extended to the interference with the "easement of light and air" by the construction of

[1] Omaha, etc. R. R. Co. v. Janecek, 46 N. W. Rep. 478; Citing R. R. Co. v. Combs 10 Bush, 382; Railway Co. v. Eddins, 60 Tex. 656; Cogswell v. R. R. Co., 8 N. E. Rep. 528; R. R. Co. v. Fifth Baptist Church, 108 U. S. 317; Railway Co. v. Gardner, 45 Ohio State, 309; Drucker v. R. R. Co., 12 N. E. Rep. 568.

[2] Elliott on Roads and Streets, 155, citing Smith v. City of Rochester, 92 N. Y. 463; Story v. Elevated R. R. Co., 90 N. Y. 122; Wynehamer v. People, 13 N. Y. 378, 433; Eaton v. B. C., etc. R. R., 51 N. H. 504; 12 Am. Rep. 147; East Pa. Co. v. Schollenberger, 54 Pa. St. 144; Walker v. O. & C. R. R., 103 Mass. 10; Reeves v. Treas., 8 Ohio St. 333; Pettigrew v. Village, 25 Wis. 223; Transportation Co. v. Chicago, 99 U. S. 635; Rigney v. Chicago, 102 Ill. 76; Richardson v. Vermont Cent. R. R., 25 Vt. 465.

[3] Radcliff v. Mayor, 4 N. Y. 195, 53 Am. Dec. 357 and note 366; Whittier v. R. R. Co., 38 Me. 26; Green v. State, 78 Cal. 29; Rochette v. R. R. Co., 32 Minn. 201; Cleveland, etc. R. R. Co. v. Speer, 56 Pa. St. 325; 94 Am. Dec. 84; Pierce on Railroads, 197, 263; Cooley's Const. Lim. (4th ed.) 676, 680.

[4] Indiana, etc. Ry. Co. v. Allen, 113 Ind. 308; 3 Am. St. Rep. 650; Penn. R. R. Co. v. Marchaut, 119 Pa. St. 541, 4 Am. St. Rep. 659; Calumet R. R. Co. v. Moore, 26 Cent. L. J. 576; Guess v. R. R. Co., 72 Ga. 320; Kansas City, etc. Co. v. Kregelo, 32 Kan. 608; Patten v. R. R. Co., 33 Pa. St. 426; Wabash, etc. R. R. Co. v. McDougall, 126 Ill. 111; 9 Am. St. Rep. 359. See generally as to measure and elements of damages, notes to Winona, etc. R. R. Co. v. Waldron, 88 Am. Dec. 113, *et seq;* Ohio, etc. R. R. Co. v. Wachter, 5 Am. St. Rep. 537; Elliott on Roads and Streets, Chapter XI; Formey v. Fremont, etc. R. R. Co., 27 Cent. L. J. 8; Calumet R. R. Co. v. Moore, 26 Cent. L. J. 576.

[5] See note to Kepple v. City of Keokuk, 2 Am. & Eng. Corp. Cas. 443, 450; 6 Am. & Eng. Ency. of Law, 549; *Ib.* 545; "An Abutter's Rights in a Street," 24 Cent. L. J. 51, 58.

[6] City of Omaha v. Kramer, 25 Neb. 489; 13 Am. St. Rep. 504; Sheehy v. Kansas City R. R. Co., 94 Mo. 574; 4 Am. St. Rep. 396; Chicago, etc. R. R. Co. v. Ayres, 106 Ill. 511; Rigney v. Chicago, 102 Ill. 64; Reardon v. San Francisco, 66 Cal. 492; 56 Am. Rep. 109; Brown v. Providence, etc. R. R. Co., 71 Mass. 35; Campbell v. Metropolitan St. R. Co., 82 Ga. 320; Moore v. City of Atlanta, 16 Cent. L. J. 271.

[7] Penn. R. R. Co. v. Marchaut, 119 Pa. St. 541; 4 Am. St. Rep. 659; Penn. R. R. Co. v. Lippincott, 116 Pa. St. 472. See also the English cases, under the Land and Railway clauses Consolidation Acts, reviewed in the note to Chicago, etc. R. R. Co. v. McGinnis, 4 Cent. L. J. 11, 13.

[8] Leading Article in 19 Cent. L. J. 382, and authorities there cited; Story v. N. Y., etc. R. R. Co., 15 Cent. L. J. 391; Brakken v. Minneapolis, etc. R. R. Co., 29 Minn. 41; Lahr v. Metropolitan, etc. R. R. Co. 104 N. Y. 268; Kansas City R. R. Co. v. Story, 96 Mo. 611, Penn., etc. R. R. Co. v. Walsh, 124 Pa. St. 544; Common Council v. Croas, 7 Ind. 9; City of Indianapolis v. Kingsbury, 101 Ind. 200, 211; Transylvania University v. Lexington, 3 B. Mon. 25; City of Denver v. Bayer, 7 Colo. 113; Scioto Valley R. R. Co. v. Lawrence, 38 Ohio St. 41; Chicago, etc. R. R. Co. v. Hazel, 42 N. W. Rep. 93; Elliott on Roads and Streets, 526, 528, 532. "An Abutter's Rights in a Street," 24 Cent. L. J. 51.

[9] Indianapolis, etc. R. R. Co. v. Eberle, 110 Ind. 542; Burkham v. Ohio, etc. Co. 23 N. E. Rep. 799; Chicago, etc. R. R. Co. v. McGinnis, 4 Cent. L. J. 11, and note.

[10] Penn. R. R. Co. v. Angel, 41 N. J. Eq. 316; 56 Am. Rep. 1; Central Branch, etc. R. R. Co. v. Twine, 23 Kan. 585; Carli v. Stillwater St. Ry. Co., 28 Minn. 373; 41 Am. Rep. 290; Cogswell v. N. Y., etc. R. R. Co., 103 N. Y. 10.

an elevated railway intended to be permanent,[11] and the fact that the cars were to be operated by steam and would distribute smoke and dust and would make a noise and jar was considered as very important in determining the question. These decisions have been followed by other courts,[12] and in many cases, noise, smoke and the jar of moving cars have been considered as proper elements of damage,[13] but the contrary view has been taken in Iowa.[14] In Massachusetts a middle ground is taken and it is held that noise, smoke, soot, and the like are not distinct elements of damage, but may be considered in estimating the depreciation in value of the entire tract in so far as they are indicted to the taking of a part of the land.[15]

There is a well defined distinction between actions to recover compensation for the taking of property or the additional burden cast upon it by the construction of a railroad and actions to recover for injuries resulting from the negligent operation of the railroad. A recovery of compensation for the taking is not, therefore, a bar to an action for damages resulting from the negligent operation of the road.[16]

2. *Opinion—Evidence as to Values.*—The weight of authority solidly supports the rule that it is competent to ask a witness qualified to testify upon the subject, the value of land before it is taken for a highway or a railroad and its value after the highway or railroad is constructed.[17] This exception to the general rule that the opinions of witnesses are not admissible is rendered necessary by the very nature of the subject. As said in a recent text book, with reference to highways: "This does not invade the province of the jury, because it simply asks for the opinion of the witness as to values and not as to damages. * * * No matter how minutely lands and their surroundings may be described, a jury, unless possessing peculiar knowledge of the matter in controversy, cannot, without the judgment of persons acquainted with values, justly determine the injury or benefit which accrues to the land owner by the opening of a highway or the construction of a ditch. * * * Without some guide of this character the verdict must be the product of conjecture rather than a conclusion from proved facts."[18]

On the other hand, it is almost equally well settled that the opinion of a witness as to how much damages the land owner has suffered is not admissible, since this would be to put the witness in the place of the jury and to make his opinion determine the exact question in controversy and the very matter which they are called to decide.[19]

W. F. ELLIOTT.

[11] Story v. N. Y. Elevated R. R. Co., 90 N. Y. 122; 43 Am. Rep. 146; Lahr v. Metropolitan Elevated R. R. Co. 104 N. Y. 268. See also "An Abutter's Rights in a Street," 24 Cent. L. J. 51.

[12] Adams v. Chicago, etc. R. R. Co., 39 Minn. 289; 12 Am. St. Rep. 645. See also 6 Am. & Eng. Ency. of Law, 546.

[13] Little Rock, etc. R. R. Co. v. Allen, 41 Ark. 431; Blue Earth Co. v. R. R. Co., 28 Minn. 503; 16 Am. & Eng. R. R. Cas. 209; Campbell v. Metropolitan St. R. Co. 82 Ga. 820; 9 S. E. Rep. 1078.

[14] Dimmick v. R. R. Co. 58 Ia. 637. So in Pennsylvania: Penn. R. R. Co. v. Lippincott, 116 Pa. St. 472; 2 Am. St. Rep. 618.

[15] Walker v. Old Colony, etc. Ry. Co., 103 Mass. 10; 4 Am. Rep. 509.

[16] Elliott on Roads and Streets 533; Ohio, etc. Co. v. Wachter, 123 Ill. 440; 5 Am. St. Rep. 532; White v. Chicago, etc. R. R. Co., 23 N. E. Rep. 782; Gear v. C. C. & D. R. R. Co., 43 Ia. 83; Pierce on Railroads, 179, 242; Cooley's Const. Lim. 712. See also Hendershott v. Ottumwa, 46 Ia. 658; 26 Am. Rep. 182; Kellinger v. Forty Second St. Ry. Co., 50 N. Y. 206, 212.

[17] City of Layfayette v. Nagle, 113 Ind. 425, citing Yost v. Conroy, 92 Ind. 464; 47 Am. Rep. 156; Louisville, etc. Ry. Co. v. Peck, 99 Ind. 68; Terre Haute, etc. R. R. Co. v. Crawford, 100 Ind. 550; Heick v. Voigt, 110 Ind. 279. To same effect: Blakely v. Chicago, etc R. R. Co., 25 Neb. 207; 40 N. W. Rep. 956; Leroy, etc. R. R. Co. v. Ross, 40 Kan. 598; City of Omaha v. Kramer, 25 Neb. 489; 13 Am. St. Rep. 504; Pittsburg, etc. Co. v. Robinson, 95 Pa. St. 456; Farrand v. Chicago R. R., 21 Wis. 485; Carter v. Thurston, 58 N. H. 104; Rogers' Expert Testimony, 211, 213; Elliott on Roads and Streets, 198.

[18] Elliott on Roads and Streets, 198.

[19] Elliott on Roads and Streets, 198; Mills on Eminent Domain, § 165; Ohio, etc. Co. v. Nickless, 71 Ind. 271; Dazell v. Davenport, 12 Ia. 437; Hosher v. Kansas City, 60 Mo. 320; Tingley v. Providence, 8 R. I. 493; Rockford v. McKinley, 64 Ill. 338; Alabama, etc. Co. v. Burket, 42 Ala. 83; Cleveland, etc. Co. v. Ball, 5 Ohio St. 568; City of Omaha v. Kramer, 25 Neb. 489; 41 N. W. Rep. 295, 13 Am. St. Rep. 504; Leroy, etc. R. R. Co. v. Ross, 40 Kan. 598; Fremont, etc. R. R. Co. v. Marley, 25 Neb. 138; 13 Am. St. Rep. 482. *Contra*, Fayettville, etc. R. R. Co. v. Combs, 51 Ark. 324; 11 S. W. Rep. 418; Vandine v. Burpee, 13 Met. 288; Snow v. Boston, etc. Co., 65 Me. 230.

RECENT PUBLICATIONS.

KENTUCKY JURISPRUDENCE IN FOUR BOOKS: I. Constitutional and Political Law. II. The Law of Real Estate. III. Other Rights of Property. IV. Persons and their Obligations. With an Introduction on the Sources of Kentucky Law. By Lewis M Dembitz, of the Louisville Bar. Louisville: Published by John P. Morton & Co. 1890.

The publisher of this volume deserves credit for his pluck in the publication of a work which, however meritorious, will find little demand outside the confines of one State and that too a State where, for some unaccountable reason, law books do not seem to be in great demand. It is to be hoped, however that the publication of this work will, in some measure at least, stir up the literary lethargy into which many of the able practitioners of that State have fallen, and create in them an appetite for more. To the Kentucky practitioner this book will undoubtedly be found of great value as, if nothing more, it saves him the dull investigation through the reports. Beyond this, however, there is much originality and much that might be called philosophic in its treatment of the subjects. The book is divided into four subjects namely, First—Constitutional and Political Law. Second—The Law of Real Estate. Third—Other Rights of Property. Fourth—Persons and Their Obligations. Were it not that the discussions and citation of authority are confined to the one State the subjects would find unsatisfactory treatment in a book of but 700 pages. But the work seems to embrace all the Kentucky decisions, and we suppose that is all the Kentucky practitioner wants. The writer of this notice is a Kentuckian and therefore may be pardoned referring to the popular notion that all that the average Kentucky practitioner has in his office is a table, a spittoon, and a picture of Henry Clay. If this wide-spread tradition is in any respect true, the local practitioner has now an opportunity in this volume to effectively crush the slanderous charge under foot, and make himself a model of erudition and learning.

PUBLIC LAND LAWS Passed by Congress from April 1, 1882, to January 1, 1890, with the Important Decisions of the Secretary of the Interior and Commissioner of the General Land Office, the Land Opinions of the Attorney-General, and the Circular Instructions issued from the General Land Office to the Surveyors General and Registers and Receivers during the same Period. By Henry N. Copp, Attorney and Counsellor-at-Law. Vols. 1 and 2. Published by the Editor. Washington, D. C. 1890.

This book is designed to show the development of the public land system of the United States from 1882 where the second volume of Copp's Public Land Laws leaves the subject down to 1890 where number 19 of volume 16 of Copp's Land Owner resumes it. The author states that, in view of the large increase of matter demanding publication, branches of public land law relating to grants, including those to railroads, wagon roads, and for school, university and other purposes, as well as mineral lands, are not included. The latter are the subject of a separate book entitled "Copp's United States Mineral Lands." The two volumes before us contain matter of great value to land agents and land attorneys especially through the western country. The subjects of homesteads, preemption, timber on the public lands, land warrants, and of Indian lands, are complete and all information of interest on those subjects seem to have been collated.

BOOKS RECEIVED.

THE AMERICAN STATE REPORTS, Containing the Cases of General Value and Authority, Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States, Selected, Reported, and Annotated By A. C. Freeman and the Associate Editors of the "American Decisions." Vol. 14. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1890.

MILLS' CONSTITUTIONAL ANNOTATIONS. A Compendium of the Law Especially Applicable to State Constitutions, and Adapted to the Constitution of Colorado and by Cross-reference to the Constitution of other States. By J. Warner Mills, of the Denver Bar. Chicago: E. B. Myers and Company, Law Book Publishers. 1890.

COMMENTARIES ON THE LAWS OF ENGLAND. Books 1, 2, 3 and 4. By Sir William Blackstone, Kt., one of the Justices of his Majesty's Court of Common Pleas. From the Author's Eighth Edition, 1778. Edited for American Lawyers, By William G. Hammond, Dean of St. Louis Law School, and Lecturer on the History of Law at Boston University, the University of Michigan, and the State University of Iowa. With Copious Notes, and References to all Comments on the Text in the American Reports, 1787-1890. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1890.

CONSOLIDATED INDEX OF SUBJECTS TREATED UPON IN THE LAW TEXT BOOK SERIES. Thirty-six (36) Volumes. Alphabetically Arranged, and Referring the Practitioner to all the Works, Composing the Series, in which each Subject is Particularly Noticed and Commented upon. By our Editorial Staff. Philadelphia: The Blackstone Publishing Company. 1890.

THE LAW OF BUSINESS CORPORATIONS, Including their Organization and Management; their Powers and Obligations; their Rights and Privileges; their Assessment and Taxation; their Dissolution and Winding up; Receivers for and Judicial Control over, and the like, Embracing the New York Business Act; the New York Manufacturing Act; the New York Condemnation Law; the New York Consolidated Corporation Act, and the New Jersey and West Virginia Acts. By James M. Kerr, of the New York Bar. Banks & Brothers, New York. Albany, N. Y. 1890.

HUMORS OF THE LAW.

Governor Ferry, as we learn from the San Francisco *Law Librarian*, recently wrote the following to an applicant for an appointment as notary: "In response to a written request of twenty of the magnates of Seattle, you have been appointed to the exalted, honorable and lucrative position of notary public. I ask you however to bear in mind one responsibility that may devolve upon you. In the event that there should be an invasion of the State by a foreign foe, I shall probably call out the notaries public of the State, instead of the militia, as the former outnumber the latter by several hundred." Probably those troops would "swear terribly" and protest loudly.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ALIENS—Right to Inherit.—Under Laws N. Y. 1875, ch. 38, providing that aliens may inherit from a citizen who has "purchased and taken a conveyance" to real estate, an alien may inherit land that the owner acquired by devise, for title by devise is title by "purchase," within the meaning of the statute.—*Stamm v. Bostwick*, N. Y., 25 N. E. Rep. 233.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A reservation of property exempt from execution does not invalidate an assignment.—*Bradley v. Bischel*, Iowa, 46 N. W. Rep. 755.

3. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An assignment for creditors being, in New York, a proceeding instituted by the assignor for the benefit of such persons only as he may name, it is to be treated in Connecticut as a voluntary assignment, though the New York statute prescribes the duties of the assignor, and regulates the mode of administering the trust.—*Egbert v. Baker*, Conn., 20 Atl. Rep. 466.

4. ASSOCIATIONS—Membership.—This court has no jurisdiction to compel the admission of a person, no

elected according to its rules and by-laws, to membership in a voluntary association. Courts do not exercise visitorial powers over voluntary associations or their proceedings, except to prevent the violation of some law of the State, or to protect or enforce some right already acquired.—*Mayer v. Journeymen Stone-Cutters' Ass'n*, N. J., 20 Atl. Rep. 492.

5. BANKS AND BANKING—Forged Check.—A depositor brought to his bank a check which the cashier, simply from its amount, and not from any appearance of fraud, advised him not to take, as it might be raised, but said it could be deposited for collection, and, if it was not returned, they would suppose it all right. It was left and credited to the depositor, who, two days later, without making further inquiry, completed the sale in which it was offered in payment. The bank's correspondent credited it with the check, but about a month later it was returned by the bank on which it was drawn as being raised, and the correspondent charged it up to the depositor's bank, which charged it to the depositor: *Held*, that the depositor could not recover the amount of the bank, on the ground of negligence or because of the credit to his account.—*Rapp v. National Security Bank*, Penn., 20 Atl. Rep. 508.

6. BANKS AND BANKING—Ultra Vires.—A savings bank incorporated for the purpose of receiving deposits, etc., with power to loan money, to discount in accordance with bank usages, and "to borrow money, buy and sell exchange, bullion, bank-notes, government stocks, and other securities," has no power to deal in cotton futures, either as principal or agent; and, in an action by a broker to recover losses sustained upon transactions had through him in behalf of an undisclosed principal, the doctrine of *ultra vires* applies.—*Jemison v. Citizens' Savings Bank*, N. Y., 25 N. E. Rep. 264.

7. BASTARDY—Evidence.—In a prosecution for bastardy, evidence is not admissible for the accused, of declarations by another that he was himself the father of the child, though they were made so soon after the conception as to make it probable that the woman's condition was known to no one but herself and the man concerned in the transaction.—*Benton v. Starr*, Conn., 20 Atl. Rep. 450.

8. BILL OF EXCEPTIONS—Settlement and Signing.—Acts Tenn. 1885, ch. 65, § 1, requiring an appeal to be perfected within 30 days from the rendition of the decree or judgment, or within additional time allowed by the court on application, does not refer to a bill of exceptions, which may be signed and made a part of the record at any time before the close of the term.—*Patterson v. Patterson*, Tenn., 14 S. W. Rep. 485.

9. BILL OF EXCEPTIONS—Stipulation by Attorneys.—Alleged errors and matters of exception which are not properly subjects of record must be preserved in writing, and certified as required by statute, in order to be considered by the supreme court; and affidavits in support of or opposition to any proceeding in the court below must be embodied in a bill of exceptions.—*McCarn v. Cooley*, Neb., 46 N. W. Rep. 715.

10. CARRIERS OF GOODS—Delivery.—Goods ordered over a fictitious name, with the intent not to pay for them, were delivered by the carrier to the person giving the order, upon his presenting an unindorsed bill of lading made out in the assumed name, and without requiring him to identify himself as the consignee or the consignee's agent: *Held*, that the carrier was liable to the consignor for the price of the goods.—*Sword v. Young*, Tenn., 14 S. W. Rep. 481.

11. CONDITIONAL SALE.—A manufacturing company received machinery for its mills for which it gave its note payable in eight months, without interest. At the same time an agreement was signed between it and the payee, providing that it should keep the machinery insured, and in good order, and hold it as the property of the payee until the note had been fully paid, when the title was to pass to the company; and that on default the payee might retake the machinery as his own; and, if any part of the note should be unpaid when it was so retaken, then any payments made should be for the use of the machinery, and the note should be canceled and given up. Default having been made in payment of the note, the company's assignee in insolvency tendered the machinery to the payee who refused to take it: *Held*, that there was no absolute promise to pay from which the company could not be released by its own default and that the note was a valid claim against the estate.—*Appeal of Beach*, Conn., 20 Atl. Rep. 475.

12. CONDITIONAL SALE.—Having sold the good-will and stock of a retail store, and put the purchaser in possession of the business, giving him an absolute bill of sale, the seller cannot reclaim the goods from an assignee in insolvency under a parol condition that the title should not pass until after payment of time-notes given for a small part of the consideration, the rest of which the seller has received and retains.—*Ryder v. Cooley*, Conn., 20 Atl. Rep. 470.

13. CONSTITUTIONAL LAW—Civil Service Commission.—Laws N. Y. 1883, ch. 354, § 1, declaring that not more than two of the three persons constituting the civil service commission thereby established shall be adherents of the same political party, is not in conflict with Const. N. Y. art. 1, § 1, which provides that "no member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the laws of the land or the judgment of his peers," nor with section 6, which declares that "no person shall be deprived of life, liberty, or property without due process of law."—*Rogers v. City of Buffalo*, N. Y., 25 N. E. Rep. 274.

14. CONSTITUTIONAL LAW—Registration of Voters.—The clause of Acts. Ind. 1889, p. 163, § 13 (Elliott's Supp. § 1335), which makes the exercise of the right of suffrage by one who has been absent from the State for six months or more, on business of the State or the United States, dependent on proof that he is a taxpayer of the county, and that his name has been continuously kept on the tax duplicate during his absence, is unconstitutional and void, as it requires a property qualification in this class of voters, in addition to the qualifications prescribed by Const. Ind. art. 2, § 2.—*Morris v. Powell*, Ind., 25 N. E. Rep. 221.

15. CONTRACTS—Condition.—Plaintiff wrote to the mayor of defendant city: "We will take your * * * bonds * * * at par, you to furnish us written opinion of your city attorney as to legality of bonds," etc.: *Held*, that the proposition was conditioned on an opinion of the city attorney that the bonds were valid, and therefore the city was not bound by its acceptance.—*Coffin v. City of Portland*, U. S. C. C. (Ind.), 43 Fed. Rep. 411.

16. CONTRACTS—Public Policy—Officers of Corporation.—Defendants, who owned the majority of the stock, and were directors of a corporation, without the consent of the other stockholder, made a contract with plaintiff by which in consideration of his becoming manager of the corporation at a certain salary, and of his purchasing stock, they agreed to repurchase his stock on certain terms, if at the end of two years he concluded to withdraw from the company, or if before that time the company should dispense with his services: *Held*, that the contract was void as against public policy, even if made in good faith, because it was inconsistent with defendants' duties to the corporation.—*Wilbur v. Stoepel*, Mich., 46 N. W. Rep. 724.

17. CONTRACTS OF MARRIED WOMEN.—Under Rev. St. Ind. § 5115, abolishing all legal disabilities of married women to make contracts, except contracts of suretyship, a married woman may contract as a principal with an attorney to defend her husband against a criminal charge.—*Young v. McFadden*, Ind., 25 N. E. Rep. 284.

18. CONVEYANCE—Husband to Wife.—A claim that a conveyance of land to a wife was a voluntary settlement on her by her husband is not sustained where the proof shows that, with the exception of a trifling amount, the entire purchase money was paid by the wife from a fund slowly accumulating during a period of 18 years, as a result of her economy, and earnings

made in keeping boarders and as a seamstress, together with her savings, from time to time, of small sums given her by her husband, or saved by her out of her personal or household expense fund.—*Carpenter v. Franklin*, Tenn., 14 S. W. Rep. 484.

19. CORPORATIONS—Organization.—Laws N. Y. 1848, ch. 40, authorizing the incorporation of manufacturing companies, provides (section 3, as amended by Laws 1883, ch. 232), that "the stock, property, and concerns of such company shall be managed by not less than three nor more than thirteen trustees, who shall respectively be stockholders in such company:" *Held* that, it appearing that two of the persons named in the certificate of incorporation as trustees for the first year were shareholders, and it not appearing that the third was not, and it not being alleged that the corporation was not legally organized, it must be assumed that its organization was legal.—*Welch v. Importers' & Traders' Nat. Bank*, N. Y., 25 N. E. Rep. 269.

20. CORPORATIONS—Purchase of Property from Shareholder.—Where a shareholder in a water company, at his own expense and for his own benefit, has built a system of pipes, etc., suitable for an extension of the company's plant, he has a right to sell the same to the company; and the fact that at a meeting of the shareholders he voted his shares in favor of the purchase does not make the transaction a fraud upon the minority shareholders, who were opposed thereto, and they cannot enjoin the issuance of the company's stock and bonds in payment therefor, without showing actual fraud, or that the price paid was so exorbitant as to necessarily lead to the inference of fraud.—*Gamble v. Queen's County Water Co.*, N. Y., 25 N. E. Rep. 201.

21. CORPORATIONS—Stockholders.—A bonus demanded by a corporation of its stockholders for the privilege of subscribing to an issue of new stock cannot be recovered, though paid under protest, in the absence of duress; and the denial of a stockholder's right to the new shares without payment of the bonus does not constitute duress, as after a tender he may sue and recover the market value of the stock, and with this sum buy other shares.—*De la Cuesta v. Insurance Co.*, Pa., 20 Atl. Rep. 505.

22. CORPORATIONS—Stockholders.—Under Rev. St. Ind. 1881, § 3934, which makes stockholders in a railroad corporation individually liable to laborers for all labor done in the construction of the road that shall remain unpaid after the assets of the corporation shall have been exhausted, a complaint which alleges that defendants have subscribed to the stock of a certain railroad company, that plaintiffs hold certain judgments against the company, one of which is for work and labor, and that the company is insolvent, does not state a cause of action, since it does not show that plaintiff's claims are for labor done in the construction of the road.—*Toner v. Fulkerson*, Ind., 25 N. E. Rep. 218.

23. COUNTY ATTORNEY—Fees.—Gen. St. Ky. ch. 5, art. 3, § 9, which provides that, in all prosecutions for misdemeanors before any county judge, police judge, justice of the peace, etc., the county attorney shall receive 30 per cent. of all fines and forfeitures imposed or recovered, does not authorize the recovery of such commission for attending before a justice when, as an examining magistrate, he declares a bail bond forfeited, and turns the matter over to the circuit court.—*Christian, Trustee, v. Byars*, Ky., 14 S. W. Rep. 491.

24. COUNTY BOARD—Voluntary Services.—Where parties voluntarily construct a levee on private property subsequently dedicated to the public, the power of the board of county commissioners to reimburse them depends wholly upon whether the board could have employed them to do the work at the time it was done, and unless it had power to do so its allowance of a claim for such services is illegal, however beneficial the work may have been to the public, and any tax payer feeling aggrieved may have relief by appeal.—*Gemmil v. Arthur*, Ind., 25 N. E. Rep. 283.

25. COUNTY COMMISSIONERS — Powers.—Rev. St. Ind. 1881, § 2825, providing that whenever, in the opinion of the county commissioners, the public convenience shall require a bridge over any water-course, they shall cause the same to be erected, places the time, place and manner of constructing bridges in the discretion of the board of commissioners, and they are not divested of such discretion until such bridges are constructed, and having such discretion it is not in the power of the courts to control the same.—*State v. Board of Commissioners*, Ind., 25 N. E. Rep. 286.

26. CRIMINAL EVIDENCE.—One who has heard a deceased person testify may testify as to what he said, though he cannot repeat the exact language used, and does not recollect the order of the testimony.—*State v. O'Brien*, Iowa, 46 N. W. Rep. 753.

27. CRIMINAL EVIDENCE—Cohabitation.—On a trial of a man and a woman for lewd cohabitation, admissions made by him in her absence are admissible as evidence against him.—*State v. Miller*, Iowa, 46 N. W. Rep. 751.

28. CRIMINAL EVIDENCE — Dying Declarations.—Two persons charged with murder were taken from jail by a mob, and one of them was hanged. Just before being hanged he confessed his guilt, and exonerated his companion: *Held*, that his statement was not admissible in evidence on the trial of the latter, since dying declarations are only admissible in proceedings where the death of the declarant is the subject of the investigation.—*Mitchell v. Commonwealth*, Ky., 14 S. W. Rep. 489.

29. CRIMINAL LAW—Conspiracy.—Where on trial for murder the theory of the prosecution is that defendant, together with his co-defendants, conspired to commit the crime, the declarations of the co-defendants made in the absence of defendant, and in furtherance of the conspiracy, are admissible against him, but the declaration of a co defendant made two days before the commission of the crime, and in a casual conversation with a neighbor, to the effect that the deceased "will not be there next winter, and don't you forget it," is not a declaration in furtherance of the conspiracy, and is inadmissible, though it was spoken in a conversation concerning the matter of difference between defendants and deceased.—*State v. McGee*, Iowa, 46 N. W. Rep. 764.

30. CRIMINAL LAW—Embezzlement.—An indictment for embezzlement of diamonds charged that the diamonds were given to defendant to sell to a certain person. There was evidence tending to sustain this charge, but some of the evidence tended to show authority to sell to any one: *Held*, no variance.—*State v. Foley*, Iowa, 46 N. W. Rep. 746.

31. CRIMINAL LAW—Homicide—Self-defense.—In Tennessee the law of self-defense under the decisions is that "if, at the time of the killing, the defendant was in danger of death or great bodily harm, or honestly believed, upon reasonable grounds, that he was in such danger, then the killing would be not murder or manslaughter, but would be self-defense: *Held*, that a charge on self-defense which used the term "great or enormous bodily harm," instead of "great bodily harm," was prejudicial error.—*McDonald v. State*, Tenn., 14 S. W. Rep. 487.

32. CRIMINAL LIBEL.—An indictment for libel which charges that defendant published an article alleging that a certain congressman and candidate for re-election had attempted to sell the appointment to a post-office in his district, and that the allegation was false, and was published maliciously, for an unlawful purpose, need not allege that defendant did not believe the same to be true, or that he had no reasonable grounds for believing it, since, if the publication was a privileged one, that was a matter of defense.—*State v. Cowable*, Iowa, 46 N. W. Rep. 759.

33. CRIMINAL LIBEL—Sending Letter.—The Tennessee Code (Mill & V. § 5552) has not changed the common law that while the sending of a sealed letter which is libelous to the plaintiff, without any other act on the part of the defendant towards making its contents known to a third person, is punishable criminally, it is not a publication sufficient to support a civil action for

defamation.—*Warnock v. Mitchell*, U. S. C. C. (Tenn.), 43 Fed. Rep. 428.

34. CRIMINAL PRACTICE—Forgery.—Under Gen. St. Ky. ch. 29, art. 9, § 5, which provides for the punishment of any person who shall "forge or counterfeit * * * or shall knowingly utter or publish any such instrument," an indictment which charges that defendant "did utter and publish as true a certain false, forged and counterfeited order" is not bad for duplicity, since the words "forge" and "counterfeit" do not charge two separate offenses, nor do the words "utter" and "publish."—*Johnson v. Commonwealth*, Ky., 14 S. W. Rep. 492.

35. CRIMINAL PRACTICE—Kidnapping.—Under Rev. St. Ind. 1881, § 1915, which declares that "whoever kidnaps, or forcibly or fraudulently carries off, or decoys from his place of residence, or imprisons or arrests any person, with the intention of having such person carried away from his place of residence, * * * shall be guilty of kidnapping," an information which charges in one count a carrying away of a certain female from her place of residence, and in another a fraudulent decoying of said female from her place of residence, need not charge a felonious intention in the commission of the acts alleged.—*Boes v. State*, Ind., 25 N. E. Rep. 218.

36. CURTESY—Remainder.—A husband cannot have curtesy in lands of which his wife had only a remainder, expectant on a prior estate which did not determine during coverture.—*Todd v. Oviatt*, Conn., 20 Atl. Rep. 440.

37. DAMAGES—Breach of Contract.—Three persons covenanted to buy jointly a set of boring tools, and each sink an oil well on his own land, and at his own expense, and, if successful, to deliver to the others one-twentieth of the oil taken. One sunk his well, but obtained no oil, and there was no evidence that any could be obtained in the county: *Held*, that he could recover no damages for failure of the others to sink wells.—*Hutchinson v. Snider's Ex'rs*, Pa., 20 Atl. Rep. 510.

38. DEDICATION—The question whether certain lands have been dedicated and accepted as a public street is one of fact.—*Flack v. Village of Green Island*, N. Y., 25 N. E. Rep. 267.

39. DEDICATION — What Constitutes.—Where land is described as bounded by the center line of a street extended, and the street has never been opened or dedicated adjoining such land, the mention of the street does not amount to a dedication.—*Sandford v. City of Covington*, Ky., 14 S. W. Rep. 497.

40. DEED—Boundary—Natural Monument.—A deed described the boundary of the land conveyed as running to a certain creek, and "thence up the creek at high-water line in a northeasterly direction, the bearing is about north, 86 deg. east." The creek ran southwesterly, but not at the angle named: *Held*, that the creek, being a natural monument, controlled the course, and formed the boundary.—*Shepherd v. Nave*, Ind., 25 N. E. Rep. 220.

41. DEED—Construction—The owner of an undivided interest in the swamp lands of a county conveyed a few acres of it; and before the deed was recorded, sold to another purchaser, whose agent had notice of the deed, "all remaining interests of whatever character which the said [grantor] now has or hereafter may acquire in any of said lands:" *Held*, that said second deed did not pass title to the land previously conveyed.—*Callanan v. Merrill*, Iowa, 46 N. W. Rep. 753.

42. DESCENT—Payment of Debts by Heirs.—An intestate died, having indorsed a large amount of the notes of a corporation, which was insolvent, or on the verge of insolvency. Had the notes been presented against the estate the assets would have been insufficient to pay the debts. With the approval of the administrators, the adult heirs guarantied bonds of the corporation, the proceeds of which were used to take up the notes. Six years later the corporation failed, and the adult heirs were compelled to pay part of the bonds. The loss was much less than it would have been had nothing been done to enable the corporation to meet the notes. In a suit against the administrators and the minor heirs: *Held* that, while there was no liability at law, the estate was bound in equity to repay to the adult heirs the sum they had paid on the bonds.—*Benedict v. Chase*, Conn., 20 Atl. Rep. 448.

43. DESCENT AND DISTRIBUTION.—A testator gave the residue of his estate to his nephews and nieces, directing that the share of each should be set apart, and the income thereof paid to the person entitled thereto during life, and that, on any nephew or niece dying without issue surviving, his or her share should be divided among the others, and their children: *Held* that, until the death of the last of the life-tenants, there could be no distribution of the residue, and that the share of one of them, who was a non-resident, could not be transferred, under section 497, to a trustee appointed at his domicile.—*Appeal of Hewitt*, Conn., 20 Atl. Rep. 453.

44. DESCENT AND DISTRIBUTION.—An action against heirs, devisees, or legatees to recover real or personal estate which has been received by them as distributees of any estate which is liable for any debts under the tenth subdivision, ch. 23, Comp. St., is not an original action, but a special proceeding for the enforcement and collection of a claim allowed or established in the county court. The district court of the proper county has jurisdiction of such proceeding.—*Horst v. McCormick H. M. Co.*, Neb., 46 N. W. Rep. 717.

45. DESCENT AND DISTRIBUTION—Posthumous Children.—Under Act Pa. April 8, 1833, providing that every person shall be deemed to have died intestate as far as regards his children born after the execution of the will, and not provided for therein, such children will not be deprived of their right to testator's land, and compelled to resort to proceeds of sale, because of a power of sale given the widow, in connection with a devise to her in fee of all testator's property, where the sale did not purport to be made by virtue of the power, but by the widow as sole devisee.—*Robeno v. Marlatt*, Penn., 20 Atl. Rep. 512.

46. EJECTMENT OF TENANT—Improvements.—Where, under a lease granting the right to bore for oil, but providing that the premises should be used for no other purpose, the lessees discovered gas, and afterwards suffered a forfeiture for breach of conditions, and were ejected, they had no equity to be reimbursed for the expense of drilling the well out of the fund produced by the sale of the gas.—*Allen v. Palmer*, Penn., 20 Atl. Rep. 516.

47. ELECTIONS AND VOTERS—Qualifications—Appellee, after reaching 21 years of age, went from his home, in Harford county, to Baltimore, and entered Morgan College, where he lived for seven years, except during vacations, when he was employed as a waiter at various summer resorts. During this time he supported himself by his own efforts, and once a year visited his mother at his old home in Harford county, remaining each time two or three days. Several years after entering college he procured a transfer of his registration as a voter from Harford county to Baltimore, and has voted there ever since: *Held* that, under Const. Md. art. 1, § 1, prescribing the qualifications of voters, he was a "resident" at the college, and was entitled to registration in the precinct in which it was situated.—*Shaeffer v. Gilbert*, Md., 20 Atl. Rep. 434.

48. EQUITY—Charities.—The benefits received in the way of religious instruction and consolation by one who attends regularly upon the ministrations of a religious society forms a meritorious consideration for a conveyance of land by such attendant to the society which will induce a court of equity to cure a defect in the conveyance.—*Visitors M. E. Church v. Town*, N. J., 20 Atl. Rep. 488.

49. EQUITY—Jurisdiction.—Rev. St. Tex. art. 649, provides that if the plaintiff's cause of action be a claim for unliquidated damages founded on tort, the defendant shall not be permitted to set off any debt due him by plaintiff; and if the suit be founded on a certain demand, the defendant shall not be permitted to set off unliquidated damages founded on tort. Article 650

provides that defendant may set off any counter-claim arising out of, or incident to, plaintiff's cause of action: *Held*, that these provisions do not require the pleading of a set-off so as to defeat a suit in equity to enforce it, on the ground that the party pleading it has an adequate remedy at law.—*Fitzhugh v. McKinney*, U. S. C. C. (Tex.), 43 Fed. Rep. 461.

50. ESTATES—Remainder.—A remainder limited upon an estate tail will be held to be vested, though it is uncertain whether a right to possession will ever vest in the remainder-man. An estate is vested when there is a present fixed right of present or future enjoyment. It is the present capacity of taking effect in possession, if the possession were to become vacant, that distinguishes a vested from a contingent remainder.—*Havens v. Sea-Shore Land Co.*, N. J., 20 Atl. Rep. 497.

51. EVIDENCE.—In a suit by an attorney to recover for his services in a case before the supreme court, the official report of the decision is not admissible to show that he appeared in that court and made an argument and prepared a brief in the case.—*Roraback v. Pennsylvania Co.*, Conn., 20 Atl. Rep. 465.

52. EVIDENCE—Expert Testimony.—Where, in an action for personal injuries that resulted in the amputation of plaintiff's arm, plaintiff testifies that he has suffered continuous pains seemingly located in the amputated arm and hand, a medical expert may testify as to whether or not the patient in such a case would, in his opinion, experience the pain of an imaginary limb—arm and hand.—*Hickenbottom v. Delaware, L. & W. R. Co.*, N. Y., 25 N. E. Rep. 279.

53. EVIDENCE—Parol.—In an action on a contract for the sale of "Cooley Hay Stackers," parol evidence is admissible to identify the kind of articles contracted for, and thus apply the contract to its subject matter.—*Clark v. Crawfordsville Coffin Co.*, Ind. 25 N. E. Rep. 288.

54. EVIDENCE—Parol.—Where a mortgage and commissioner's deed in proceedings to foreclose it leave the boundaries of the property uncertain, parol evidence is admissible to explain the ambiguity, and to show what was intended by the parties.—*Shelby v. Teris*, Ky., 14 S. W. Rep. 500.

55. EVIDENCE—Trial.—A stipulation that the testimony taken in another action may be used in the case does not make such testimony evidence in the case unless it is offered therein.—*Pitts v. Lewis*, Iowa, 46 N. W. Rep. 739.

56. EVIDENCE GIVEN AT FORMER TRIAL.—Where on a former trial plaintiff testified as to the location of his bucket, and on the last trial gave exactly the same evidence, it was proper to allow the reading of the testimony of another witness, given at the former trial, that "I heard the testimony of Johnson [plaintiff] as to where his bucket was placed under the hatch. I should consider that the proper place for the bucket to stand."—*Johnson v. Spear*, Mich., 46 N. W. Rep. 733.

57. EXECUTION—Corporate Stock.—Under Code Iowa, §§ 2967, 3050, which provides that corporate stock may be levied on by notifying the president or other officer of the corporation, such notice must be in writing. An oral notice, together with an indorsement of the levy on the stub of the stock book is not sufficient.—*Moore v. Marshalltown O. H. Co.*, Iowa, 46 N. W. Rep. 750.

58. EXECUTION SALE.—An execution sale of 300 acres of farming land in two tracts will not be set aside, because made *en masse*, when the return shows that the land was first offered for sale in separate tracts without bids, and the record does not show what evidence was offered on the question whether the sale *en masse* was an injury to the defendant.—*Connecticut Mut. Life Ins. Co. v. Brown*, Iowa, 46 N. W. Rep. 749.

59. EXECUTORS AND ADMINISTRATORS—Sale of Land.—The regularity of the publication of notice to a non-resident heir, in proceedings in the probate court by an administrator to sell real estate to pay debts, cannot be questioned in ejectment against the purchaser at the sale.—*Berrian v. Rogers*, U. S. C. C. (Colo.), 43 Fed. Rep. 467.

60. EXECUTORS' SALES—Leave to Purchase.—Where executors desire to become purchasers at the sale of their testator's lands, the proper method of proceeding to obtain the necessary leave of the court is not by petition, but by a bill, to which all persons interested should be made parties.—*In re Patterson's Ex'rs*, N. J., 20 Atl. Rep. 486.

61. FACTORS AND BROKERS.—That the seller of stock knew the agent was to receive certain shares from the buyer as compensation for services, and the buyer knew he was claiming compensation from the seller, will not operate as a waiver of the rule that an agent cannot recover compensation from both parties.—*Rice v. Davis*, Penn., 20 Atl. Rep. 513.

62. FACTORS AND BROKERS—Accounting.—A corporation having received goods for sale on commission, and sold them, contrary to the direction of the owner, at prices lower than those fixed by him, accounting for the amount actually received, it is liable for the difference, though its dealings in the goods was *ultra vires*.—*Union Hardware Co. v. Plume & A. Manuf'g Co.*, Conn., 20 Atl. Rep. 455.

63. FEDERAL COURTS — Jurisdiction.— Acceptance of service, being merely equivalent to personal service in the district, does not prevent a defendant from moving to dismiss the suit because brought in a district in which he does not reside.—*United States v. Loughrey*, U. S. C. C. (Mich.), 43 Fed. Rep. 449.

64. FRAUDULENT CONVEYANCES—Husband and Wife.—In a creditors' bill, brought to subject certain real estate conveyed by a husband to his wife, the proof clearly established the fact that the consideration which he paid for the real estate was derived from the separate estate of the wife, but that the title was taken in the name of the husband, under a parol agreement to convey to her, on demand. The court below having found in favor of the wife, *held*, that the judgment was supported by the clear weight of evidence.—*Goldsmith v. Fuller*, Neb., 46 N. W. Rep. 712.

65. GAMING CONTRACTS—Negotiable Instruments.—A transaction whereby 10 bushels of oats of the actual value of 30 or 40 cents a bushel, are delivered by one party to the other, upon an agreement that the party receiving the oats should execute his note for $100, the party furnishing the oats agreeing in turn to sell 20 bushels of oats to be delivered by the maker of the note at the price of $10 per bushel, both parties having full knowledge of the actual value of the oats, is a wagering contract, and void as between the parties.—*Schmueckle v. Waters*, Ind., 25 N. E. Rep. 281.

66. HABEAS CORPUS — Appealable Order.— On *habeas corpus* by a testamentary guardian for the possession of the ward, a girl seven years old, the court dismissed the writ, without prejudice to a renewal by the guardian, and, without any final adjudication as to the guardian's legal right, made a temporary disposition of the child, delivering it, for reasons affecting its health and welfare, to the control and custody of persons to whom the child's deceased mother had intrusted it: *Held*, that this was in the discretion of the court, and not appealable.—*People v. Walts*, N. Y., 25 N. E. Rep. 286.

67. INJUNCTION—Breach of Contract.—Though an employee's familiarity with the business, and his knowledge of the customers acquired during the employment, have made his services of peculiar value, an injunction will not issue against a violation of his contract to render such personal services as its manager may require, including traveling and acting as its secretary or other officer, such services not being so peculiar or individual that they could not be performed by any one of ordinary intelligence or fair learning.—*Wm. Rogers Manuf'g Co. v. Rogers*, Conn., 20 Atl. Rep. 467.

68. INJUNCTION — Judgment.—A judgment against a defendant who was never served with process, and whose appearance in the action was entered by attorney without his knowledge or consent, may be enjoined, though such defendant does not show that he

has any defense to the claim sued on.—*Mills v. Scott*, U. S. C. C. (Ga.), 43 Fed. Rep. 452.

69. INSURANCE—Conditions.—An insurance policy provided that a note taken for the premium should be accepted as payment only until maturity, that if not paid at maturity the policy should be void while it remained unpaid, and that, on payment of the note after maturity, the policy should be in force from such payment. The property was burned after maturity of the note, and while it remained unpaid: *Held*, that a tender of payment after the fire would not revive the company's liability.—*Continental Ins. Co. v. Dorman*, Ind., 25 N. E. Rep. 213.

70. INSURANCE—Policy.—A mutual fire insurance policy provided that "should the annual interest, or any assessment that may be levied on the premium note given for this insurance, be in arrears and unpaid for the space of 30 days after notice and demand, then * * * this policy shall be void:" *Held*, this provision was for the benefit of the company, and the company could waive it, and where it did so by bringing suit for assessments after such default, the assured could not set up the invalidity of the policy as a defense.—*Susquehanna Mut. Fire Ins. Co. v. Leavy*, Pa., 20 Atl. Rep. 502.

71. JOINT TENANTS—Crops.—A tenant in common of a farm becomes the absolute owner of the crops growing and severed by him while in peaceable possession, and can maintain trover against his co-tenants for the crops carried away by them, without his consent, after he had severed them from the soil.—*Le Barron v. House*, N. Y., 25 N. E. Rep. 253.

72. JUDGMENT—Parties.—Defendants in an action relating to real property, proceeded against as "the unknown heirs" of a deceased person, as authorized by section 5, ch. 75, Gen. St. 1878, upon whom the summons was served by publication only, and against whom judgment by default has been entered, may apply to be relieved from it and for leave to answer and defend under section 125, ch. 66, *Id.*, within one year after notice of the entry of judgment.—*Boeing v. McKinley*, Minn., 46 N. W. Rep. 766.

73. JUDGMENT—Recording.—No lien is created on the land of a partnership by the record of an abstract of judgment indexed under the firm name only, though the names of the partners are given in the abstract; Rev. St. Tex. 1879, art. 3159, providing that when any judgment has been recorded and indexed, it shall, from the date of such record and index, operate as a lien, and article 3158, that the index shall be alphabetical, and shall show the name of each defendant.—*Gullett Gin Co. v. Oliver*, Tex., 14 S. W. Rep. 451.

74. LIFE INSURANCE—Assignment of Policy.—Where a creditor insures the life of his debtor, and afterwards assigns for the benefit of his own creditors, but keeps the policy, which after that he transfers to a third person, the administrator of the insured cannot recover the amount from the transferee to whom it was paid, on the ground that the first holder could transfer no title after this general assignment; for whether he could or not is no concern of the insured or his administrator.—*Shaak v. Meily*, Pa., 20 Atl. Rep. 515.

75. LIFE INSURANCE—Fraud—Suicide.—In an action by a creditor of the insured, on a policy of insurance in a benefit society, where the defense was that the insured procured the policy in pursuance of a fraudulent purpose to obtain a large amount of insurance upon his life for the benefit of his creditors and relatives and then commit suicide, which purpose was consummated, it was proper to admit as part of the *res gestæ*, evidence of his application to 36 different insurance companies, and of his letters and telegrams to relations and friends written and sent as steps in the consummation of this purpose, and indicating a sane and deliberate attempt to consummate the fraud.—*Smith v. National Ben. Soc.*, N. Y., 25 N. E. Rep. 197.

76. LIMITATION OF ACTIONS.—An injunction obtained by the wife restraining the husband from disposing of or interfering with her property does not prevent him from bringing an action to recover it or its value when wrongfully taken from his possession by a third person, and the running of the statute of limitations will not be intercepted as to such cause of action during the continuance of such injunction.—*Van Wagoner v. Terpenning*, N. Y., 25 N. E. Rep. 254.

77. LIMITATION OF ACTIONS.—Pub. St. Mass. ch. 197, § 13, provides: "If in an action duly commenced within the time limited * * * the writ fails of a sufficient service of return by an unavoidable accident, or by a default or neglect of the officer to whom it is committed, * * * or if a judgment for the plaintiff is reversed on a writ of error, the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment." Plaintiff duly commenced an action against defendant by suing out a writ and putting it in the hands of an officer for service. The officer attached the goods of defendant, who was a non-resident, and a notice was given defendant by publication on order of the court. Judgment for plaintiff was reversed on writ of error, and the action ordered dismissed for want of jurisdiction: *Held*, that plaintiff could commence a new action on the same cause within a year thereafter.—*McCormick v. Eliot*, U. S. C. C. (Mass.), 43 Fed. Rep. 469.

78. LIMITATION OF ACTIONS—Pledge.—Where a pledge made to secure future advances is repudiated by the pledgee, the statute of limitations will begin to run against the pledgor's right to recover the pledged property from the time such repudiation takes place.—*Gilmer v. Morris*, U. S. C. C. (Ala.), 43 Fed. Rep. 456.

79. MASTER AND SERVANT.—Where defendant agrees to work for plaintiff on an orange grove for stated wages together with house-rent, fuel and necessary table provisions, he is bound to devote his whole time to plaintiff's business.—*Stebbins v. Waterhouse*, Conn., 20 Atl. Rep. 480.

80. MASTER AND SERVANT.—Defective Appliances.—In an action against the owners of a saw-mill for personal injuries sustained by an employee in getting his hand cut in a lathe-saw, the gauge of which he was attempting to change while in motion, expert evidence that the gauge used on that saw was as safe as other gauges used on other saws is inadmissible, when the jury have a model of the saw before them, and can see for themselves just how dangerous it is to operate, and how the danger compares with that incurred in the use of other saws concerning which testimony had been given.—*Sprague v. Atlee*, Iowa, 46 N. W. Rep. 756.

81. MASTER AND SERVANT — Fellow-servants.—In an action against a railway company for the wrongful death of plaintiff's intestate, it appeared that deceased had just entered defendant's machine-shops to learn the trade, and that he was ordered to aid in cleaning some water-pipes at a place where a trench was opened by the sectionmen so that pipes could be reached. While disconnecting the pipes in the trench, the earth caved in and smothered deceased: *Held*, that it was the duty of defendant to furnish deceased a safe place in which to work, and that it was error to direct a nonsuit on the ground either that deceased took the risk of the danger or that the sectionmen were his fellow-servants.—*Kranz v. Long Island R. Co.*, N. Y., 25 N. E. Rep. 206.

82. MASTER AND SERVANT—Negligence.—A boy, 15 years old, employed in a quarry, was set to work close to a projecting rock, which, from some unexplained cause, fell and injured him. It was the duty of the foreman to have tested the rock, and, if found dangerous, to have removed it; but no such test was made: *Held*, that deceased had the right to assume that the rock had been tested, and that the right to recover for his death was not affected by the fact that, in the excitement of the moment, he lost his presence of mind, and ran into the course of the rock.—*McMillan Marble Co. v. Black*, Tenn., 14 S. W. Rep. 479.

83. MECHANICS' LIENS—Married Women's Property.—A wife having consented that her husband should, at

his own expense, build houses on land held by title of record "to her sole and separate use," the contractor who furnished the materials and built the houses supposing that the husband was the owner is not entitled to a lien under Gen. St. Conn. § 3018, giving a mechanic's lien for materials furnished or services rendered under "an agreement with or by the consent of the owner of the land.—*Huntley v. Holt*, Conn., 20 Atl. Rep. 469.

84. MECHANICS' LIENS—Notice.—Under Elliott's Supp. Ind. § 1692, which requires a subcontractor, in order to obtain a lien, "to notify the owner or his agent that he is furnishing materials or performing work for the contractor," the fact that a subcontractor informed the owner in a conversation that he was furnishing materials for the building is not sufficient to create a lien for materials theretofore furnished.—*Caylor v. Thorn*, Ind., 25 N. E. Rep. 217.

85. MECHANICS' LIENS—Subcontractors.—The assignee of moneys due and to become due under a contract made by the assignor with the City of New York cannot recover the balance due on the contract to the exclusion of a subcontractor who failed to file his notice of claim with the commissioner of public works, the officer designated in the contract as the one to receive such notices, but who did file it with the comptroller, by whom it was received and acknowledged on behalf of the city. The assignee, having advanced the money prior to the performance of the contract, was not misled by the failure to give notice to the proper officer, and therefore can equitably claim only the balance due the assignor after paying all just claims against him of which the city had actual notice.—*Mechanics' & Traders' Nat. Bank v. Winant*, N. Y., 25 N. E. Rep. 262.

86. MORTGAGE—Payment.—A mortgage debt may be discharged by articles of merchandise, or any other personal property, if tendered and received for that purpose.—*Ketchem v. Gulick*, N. J., 20 Atl., Rep. 487.

87. MUNICIPAL CORPORATION—Defective Sidewalk.—Where a city charter expressly confers upon the common council the control of all sidewalks and imposes a liability for neglect the city is liable for injuries although the property owners constructed the sidewalk.—*Fuller v. Mayor*, Mich., 46 N. W. Rep. 722.

88. MUNICIPAL CORPORATION—Powers of Selectmen.—Under the power given by Gen. St. Conn. § 64, to superintend the concerns of the town, the selectmen may, though the town itself has taken no action, employ counsel, and spend its money in proper ways, in opposing a petition asking the legislature to divide its territory, and apportion its property, debts, and liabilities.—*Farrel v. Town of Derby*, Conn., 20 Atl. Rep. 460.

89. MUNICIPAL CORPORATIONS — Taxation.—A city whose corporate limits extended to low-water marks on the Indiana side of the Ohio river authorized a bridge company to construct a bridge across the river within its limits, and granted it certain land adjoining the river. The contract provided that it should not be construed as waiving the right to tax the approaches to the bridge, and the bridge itself: *Held*, that the city thereby acquired the right to tax the entire bridge for municipal purposes.—*Henderson Bridge Co. v. City of Henderson*, Ky., 14 S. W. Rep. 493.

90. MUTUAL BENEFIT INSURANCE.—A certificate of membership in an assessment insurance association contained a promise to pay "a sum received from a death assessment," not to exceed $1,000, within 60 days after proof of death. It also provided that, on the death of any member, the insured should pay an assessment of whatever the directory should deem necessary, and it prescribed the form of notice, and the process of collecting the death assessment from each of the members: *Held*, that a promise was implied to cause an assessment to be made which, if duly paid, would raise $1,000, or as much thereof as would, with the funds on hand, make that sum.—*Lawler v. Murphy*, Conn., 20 Atl. Rep. 457.

91. NATIONAL BANKS—Liability of Directors.—Where the directors of a national bank assent to a loan, in excess of the limit prescribed by Rev. St. U. S. § 5200, and subsequently retire paper representing a part of this loan, by charging it against an illegal dividend, declared when the bad paper reckoned to make up an apparent surplus more than exceeds the capital stock, the transaction is invalid, and, for the amount of the paper thus retired, the directors are personally liable, as provided by section 5239, for damages sustained in consequence of excessive loans.—*Witters v. Sowles*, U. S. C. C. (Vt.), 43 Fed. Rep. 405.

92. NEGLIGENCE—Evidence.—In an action for damages for the burning of plaintiffs' vessel, it appeared that the vessel was lying at a wharf adjacent to defendant's petroleum refinery; that there was an explosion in the refinery followed by a fire; that the burning oil flowed down a pipe, used by defendant in pumping oil into the refinery from vessels, into a lighter filled with oil; that this exploded, communicating the fire to plaintiffs' vessel, about 30 miles therefrom: *Held*, that these facts did not establish a cause of action, defendant being liable only for its negligence, and the mere fact of an explosion not raising a presumption of negligence.—*Comlich v. Standard Oil Co.*, N. Y., 25 N. E. Rep. 259.

93. NEGLIGENCE—Pleading.—In an action against a railroad company by the employee of another company for personal injuries, the complaint need not allege that plaintiff's fellow-servants were not guilty of contributory negligence.—*Kentucky & I. B. Co. v. Hall*, Ind., 25 N. E. Rep. 219.

94. NEGOTIABLE INSTRUMENTS.—In the absence of a statutory notice, the mere failure of the holder of a note to attempt to collect until the principal maker has become insolvent does not release a maker who has signed the note as surety.—*May v. Reed*, Ind., 25 N. E. Rep. 216.

95. NOTARY PUBLIC.—Where a county clerk who is also a notary public takes acknowledgments of deeds and mortgages, and takes affidavits and depositions as a notary public, it is his duty to enter upon his fee-book as county clerk, and report to the county board, every item of fees received by him for such services.—*State v. Kelley*, Neb., 46 N. W. Rep. 714.

96. NUISANCE—Corporation.—Neither the fact that a business is carried on in a careful and prudent manner, and that nothing is done by those managing it that is not a reasonable and nesessary incident of the business, nor the fact that, when the business was commenced, the lands in the vicinity were open common, will authorize the continuance of a business in the midst of a populous community, which constantly produced odors, smoke, and soot, of such noxious character, and to such an extent, that they produce headache, nausea, vomiting, and other pains and aches injurious to health, and taint the food of the inhabitants.—*People v. Detroit White Lead Works*, Mich., 46 N. W. Rep. 735.

97. PLEADING—Motion to Make Definite and Certain.—In an action for breach of warranty in the sale of certain abstract books and also for rescission of the contract and return of the money paid for the same, a motion to make the petition definite and certain by pointing out the alleged errors in such books was *held* properly overruled.—*Crowell v. Harvey*, Neb., 46 N. W. Rep. 709.

98. PLEADING—Negligence.—The court should not assume, upon the bare and necessarily brief statements of a pleading, to decide the fact of original or contributory negligence. If the pleading be technically sufficient in its averments, and it be not clear upon those technical averments that there was not negligence, the question should be reserved for the trial, and a demurrer seeking prematurely the judgment of the court will be, of course, overruled.—*Sledge v. Gayoso Hotel Co.*, U. S. C. C. (Tenn.), 43 Fed. Rep. 463.

99. PUBLIC LANDS—Bona Fide Settlers.—In a suit by the purchaser of school lands to recover possession from a settler who had a prior right to purchase, it is sufficient for the latter to offer in his pleadings to pay for the land; a tender is not necessary.—*Ward v. Worsham*, Tex., 14 S. W. Rep. 458.

100. REMOVAL OF CAUSES.—After overruling a motion to remand a cause, which had been removed from a State to a federal court on the ground that a federal question was involved, the federal court sustained a demurrer to the special plea interposed by defendant, and thereby disposed of the only federal question presented for decision: *Held*, that a subsequent motion by plaintiff to remand the cause to the State court would be sustained under the act of congress of March 3, 1875, (section 5).—*Hamblin v. Chicago, B. & Q. R. Co.*, U. S. C. C. (Ill.), 43. Fed. Rep. 401.

101. REPLEVIN—Appeal.—Where, in an action to recover specific bonds, defendant appeals from a judgment in plaintiff's favor, keeping the bonds in his possession under a proper undertaking, and the judgment is affirmed, plaintiff cannot bring another action for the depreciation in value of the bonds between the date of the judgment and its final affirmance, as the exercise of the right of appeal cannot be regarded as a tort constituting a new and illegal detention for which an action will lie.—*Corn Exchange Bank v. Blye*, N. Y., 25 Rep. 208.

102. RES ADJUDICATA.—An attorney was employed by the receiver of an insolvent firm, without agreement as to the amount of his compensation. When the receiver made his final settlement, the attorney appeared, and claimed that a larger sum than had been paid by the receiver should be allowed him for services in settling the estate. The court declined to make any further allowance, accepted the final account of the receiver, and discharged him from the trust: *Held*, a bar to an action against the receiver individually to recover additional compensation.— *Walsh v. Raymond*, Conn., 20 Atl. Rep. 464.

103. SALE—Rescission.—Plaintiff agreed to sell to defendant the furniture and household goods used in his hotel. He gave defendant an itemized statement of the goods sold, but when he delivered them many of the articles named in the statement could not be found: *Held*, that defendant was entitled to rescind the sale.—*Kuhlman v. Wood*, Iowa, 46 N. W. Rep. 738.

104. SALE—When Title Passes.—Plaintiff, a manufacturer of patent roofing, negotiated with defendants relative to the handling and sale of said roofing by defendants, resulting in a writing certifying that defendants had been given full control to handle the roofing in certain counties. At the time there was indorsed on said writing: "Sold C & Co. [defendants] one car load of roofing to be paid for as sold; settlements to be made monthly of all sold." After defendants had received the car-load and sold some of it, and made payments thereon, the remainder was burned: *Held*, that defendants were not plaintiff's agents, but that having been given an exclusive right to sell they had made an absolute purchase.—*Granite Roofing Co. v. Casler*, Mich., 46 N. W. Rep. 728.

105. SPECIFIC PERFORMANCE—Evidence.—In a suit to enforce the specific performance of an alleged contract to convey land, the evidence showed that defendant had written to plaintiff, his son, asking him to return home, and promising to divide his farm among his sons, reserving a fourth part of the crop, and that plaintiff returned, and took possession of part of the farm, which he farmed for many years with one intermission, during which his father rented the tract to another. The evidence as to the improvements was conflicting: *Held*, that the contract to convey was not established.—*Lich v. Lich*, Iowa, 46 N. W. Rep. 763.

106. SPECIFIC PERFORMANCE—Evidence.—In an action to enforce an alleged verbal contract for the conveyance of land belonging to a deceased person, there was no direct proof of the contract, but the evidence showed that deceased was plaintiff's step-mother, that she bought the land with funds received from his father's estate, that she had often expressed herself as being under obligations to plaintiff, and had stated her intention that he should have the land after her death. The services rendered by plaintiff consisted only in such acts of attention as a child would naturally render to a parent: *Held*, that the evidence was not sufficient to establish the contract.—*Sample v. Collins*, Iowa, 46 N. W. Rep. 742.

107. SURVIVAL OF ACTIONS—Remedial Statute.—An act of congress imposing a legal liability on the directors of a national bank for certain things which they may do, which shall result in an injury to the bank, its stockholders or creditors, and making them liable for the amount of the damage, is a remedial and not a penal statute, and therefore an action under it survives against the estate of a director.—*Stephens v. Overstolz*, U. S. C. C. (Mo.), 43 Fed. Rep. 465.

108. TAXATION—Exemption—Constitutional Law.—Act Ky. April 22, 1882, provides that the Louisville Water Co. shall furnish water for fire protection; and that since the stock of said company is owned by the city it is exempted from the payment of all taxes. Const. Ky. art. 13, § 1, provides that "no man or set of men are entitled to exclusive separate public emoluments or privileges, but in consideration of public services:" *Held*, that such exemption was unconstitutional, since the city owned the stock in its private and not in its governmental capacity, and the obligation to furnish water without charge was merely a service rendered by the city to itself.—*Clark v. Louisville Water Co.*, Ky., 14 S. W. Rep. 502.

109. TAXATION—List by Assessor.—A tax-payer having failed to return a list of his property, one made by the assessor is valid, though it includes "insurance stocks" without designating the companies in which the stocks were held. The assessor having added, to the valuation of the property listed by him, a penalty for neglect to make out a sworn list, taxes levied thereon may be collected, though the statute imposing the penalty was repealed after the assessment.—*City of Hartford v. Champion*, Conn., 20 Atl. Rep. 471.

110. TAX-TITLES—Judicial Notice.—A tax-deed of the "undivided 20 ac., the S. E. quarter of the S. W. quarter of sec. 10," etc., is void for uncertainty.—*Ellsworth v. Nelson*, Iowa, 46 N. W. Rep. 740.

111. TRADE-MARKS — Firm Names.—The term "International Banking Company" is not capable of exclusive appropriation by a copartnership as a firm name or trade-mark, for it is a generic term, descriptive of a class of business.—*Koehler v. Sanders*, N. Y., 25 N. E. Rep. 235.

112. TRUSTS—Rights of Trustee.—Where a will creates a valid trust, and names a trustee, the trustee takes the legal title to the trust estate, although there are no words of gift to him.— *Toronto General Trusts Co. v. Chicago, B. & Q. R. Co.*, N. Y., 25 N. E. Rep. 198.

113. WILL — Conversion.—If the direction of a will as to the proceeds of the sale of land require land to be sold, the direction is equivalent to a positive command to sell, and the land will, for the purposes of the will, be deemed to be personalty.—*Roy v. Monroe*, N. J., 20 Atl. Rep. 481.

114. WILL—Revocation—Marriage.—Under a statutory provision that marriage revokes a will, a will made by a man at the time of making an antenuptial contract four or five months before his marriage is revoked by the marriage, though the marriage is afterwards annulled by a decree of divorce.—*Stewart v. Powell*, Ky., 14 S. W. Rep. 496.

115. WILLS—Revocation of Probate.—In a proceeding to revoke probate of a will, and to have a writing of a later date probated in its stead, the execution of the first instrument was conceded: the primary matter of contestation was whether the later instrument was a forgery: *Held*, that a person claiming ownership of the realty devised by the first will as a purchaser from the devisee, and who had been made a party defendant, stood in the attitude of proponent and plaintiff, and had the right to the oponing and closing argument.—*McBee v. Bowman*, Tenn., 14 S. W. Rep. 481.